



SOME MAKERS OF INDIAN LAW

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CONTENTS

Lecture I	Introduction	5 — 28
Lecture II	Judges: Image and Qualities	29 — 46
Lecture III	Indian Legal System and the Inheritance of Common Law	47 — 65
Lecture IV	State and the Citizen: Dignity of the Individual and Unity of the Nation	66 — 85
Lecture V	Judicial Review	86 — 115
Lecture VI	Rule of Law	116 — 132
Lecture VII	Indian Federalism: Political Future of Man	133 — 147
Lecture VIII	Legal Control of Government	148 — 161
Lecture IX	Federalism — Political Future of the World	162 — 179
Lecture X	Law in the Next Society	180 — 190
Lecture XI	Epilogue	191 — 200

Lecture I

I

INTRODUCTION

I am deeply sensible of the honour of this invitation from the University of Calcutta to deliver the "Tagore Law Lectures". A decade ago, when I delivered a talk in a series dedicated to the memory of an eminent lawyer, I had occasion to observe : "In the Tagore Law Lectures, of 1937 Sir William Holdsworth spoke of 'Some Makers of English Law'. Later in 1984 Prof. Bernard Schwartz spoke of "Some Makers of American Law". It is time that some one wrote on "Some Makers of Indian Law" as a tribute to the great law makers in India."

Little did I then anticipate that I would myself be the inheritor of this singular privilege. The Tagore Law Professorship is a high honor in the field of legal studies and indeed, considered the culmination of a legal career. By a felicitous coincidence these talks are under the aegis of the University for whose development one of the eminent makers of Indian Law, Sir Ashutosh Mukherjee had contributed so much.

II

The Scope of the Present Title

Though the title for these lectures is patterned on the two earlier series, the similarities end with nomenclature. The two fore-runners were from two great law masters of that it is neither my desire nor is it prudent, to invite comparisons. In that sense the title could indeed be a mis-nomer. The scope of these talks is to take a very broad view of the great transformation that has taken place in our legal system during the crucial cross-over points in Indian legal history. This massive transformation has occurred slowly but steadily, with a sure pace not at one thrust but like imperceptible climatic change. Great transformation has taken place in the legal systems of other countries too, though the nature of the contributing forces of change might be different. The study of how the old Indian legal system highly developed as it was, has given way and is super-imposed by and absorbed into another; is an "important, unique and historic development. Socio-economic and political changes have their own influence as catalysts and accelerating factors. How the legal system become progressively secularized is in itself an engaging study. This change and transformation has made the required adjustments with western legal systems particularly in international trade and we see today easier.

With this approach it should become clear that the 'Makers of Indian Law' are not merely the judges, however

valuable their contribution. The makers of law, therefore include law-reformers, constitutionalists, social and political scientists, the law commissioners and a whole host of those who have contributed or have acted as catalysts for this change. Many economic and political events have hastened the pace of this change. In fact in 1750 AD India had nearly twenty six percent of the world's manufacturing out-put. It came down to one percent in 1900 A.D. The invention of the steam power and the industrial revolution took their toll of the countries that were unprepared and could not handle the change. Even in the countries that did there were profound changes. For instance in 1800 AD the percentage of labour force in United States of America was about 70%. Today, that country, one of the largest grain — producing countries of the world has just about 3% of its labour force in agriculture. In the area of law in India what has happened to customary Hindu Law in just five decades is truly amazing. The codifications of all the important branches of the system of personal laws of the Hindus was one of the far-reaching law reform initiatives in India This is the result of the work of the law-reformers. At a time when the customary Hindu Law was yielding place to statutory into background it is proper to recall the prolific essays of Professor Duncan Derret on modern and classical Hindu Law.

I may also briefly refer here to three great commentators on Smrithi Texts from Karnataka whose fame had spread far and wide. The first is of course, the 11th century scholar and savant Vijñaneshwara, son of Padmanabha Bhatta the celebrated author of 'Mithakshara' a commentary on Yagnavalkya Smrithi. He hailed from a place called Kalyanapura in the kingdom of Vikramarka

of the Chalukya Dynasty, (now in the Bidar District.) Bharath Ratna P.V. Kane hailed Vijnaneshwara's work as equal to the "Mahabhashya" of Patanjali for its scholarship and masterly presentation of the subject. Justice Ameer Ali, in the Privy Council paid rich tributes to Vijnaneshwara who, he said, "Explains the recondite passages in the smritis, explains discrepancies and clarifies the doubts and conflicts".¹ The Supreme Court of India has acknowledged the pre-eminence of this work.²

The next great commentator I would like to mention is Devanna Bhatta, the author of the celebrated work of "Smriti Chandrika" who lived under the Kings of Vijayanagara. The Privy Council has stated that the authority of this work is next only to the Mithakshara in respect of matters governing the Madras School of Hindu Law. A learned professor speaking of Devanna Bhatta and his work says :

"Dr. Jolly was so impressed by this work that he characterised it as displaying remarkable excellence. It is interesting to note that the Judicial Committee has referred to Devanna Bhatta's Smriti Chandrika in *Budhasingh vs Laltusing* mentioned earlier, as also in *Collector of Mathura vs. Muthu Ramalinga* (12 Moore's Indian Appeals 397). The Privy Council also noted that the Smriti Chandrika differs from the views propounded in the Mithakshara and particularly has noted that the Madras High Court has consistently applied the views of Smriti Chandra, sometimes even in a case of conflict with Mithakshara. The Supreme Court in AIR 1965 SC 1349

case stated that this authority is next only to Mithakshara. Right from 1906 in ILR 29 Madras 338 and in 1920 ILR 43 Madras 32, the Madras High Court has unequivocally been guided by the doctrines propounded in the Smriti Chandrika. Obviously, this work was more in harmony with the customs and mores of the people in the South. Though earlier the Privy Council was hesitant about applying the views of Smriti Chandrika, later unequivocally it has been accepted without any qualification. As far example in *Vedachala vs. Subramanya* 1921 (48) Indian Appeals 149. Smriti Chandrika has been extensively quoted by the Privy Council. That this work should be compared at all with the Mithakshara is a great honour and that it should be accepted by the highest judicial bodies, as a recognition of the intrinsic worth of this work. Devanna Bhatta is one among the few mentioned in the Encyclopedia of Britannica in the article on Hindu Law.³

The third is the 14th century jurist, Madhavacharya who was himself the Prime Minister of the Vijayanagar Kings and who later renounced the world and became a sanyasi of the Sringeri Shankara Tradition. His commentaries on the Smriti of Parashara called "Parashara Madhaviya" is described by the Privy Council as "a great authority in southern India"⁴

III

Religion and Law

In 1844 the Supreme Court of United States declared that 'the Christian religion is part of the common law.' The Court yet again in 1892 said that "this is a Christian nation". Bernard Schwartz spoke of how in just 30 years thereafter in the famous case "State vs John T Scope" severed the link between Law and Christianity. Scope's case, as we know, was a prosecution of a professor who taught Darwinian Evolution which violated a state of Tennessee's law proscribing propagation of any theory which denies the divine creation of man as taught in the Bible. To the defence lawyer Clarence Darrow, the case itself was a curious anomaly. He seemed to have asked "Can it be possible that the trial is taking place in the 20th century?" Although both Christianity – or certainly the organized church and socialism are in eclipse as vital, dominant philosophies, the ethic that underpins them both survives. Will Hutton says that "Europe for long accepted that reason and science are the twin underpinnings and driving forces of Western society; that religious faith cannot trump or obstruct science but must seek reconciliation with it. No European country would accept that Darwin, for example, could not be taught because they challenged the precepts of the Bible; The Bible may be taught, but so must science."⁵

IV

Amenability of Customary Hindu Law to modernization

I have also endeavoured to present very broadly — the contribution of some of our eminent Indian judges in the direction they gave to the development of law. It is my endeavour in the following lectures to indicate the interaction between the dynamics of the judicial process on the one hand and the great winds of change, scientific, economic political — sweeping over the world. This transformation of the world in to what it is today from what it was in the 18th century is a gripping story. However, the course of development of Indian Law after the advent of the common law system and later of the Constitution, has the imprint of a successive galaxy of eminent men of law — both lawyers and judges. Amongst the latter the names of Sir T. Muthuswamy Ayer, Sir Subramania Iyer, Sir Ashutosh Mukherjee, Justice Mahmood, Sir Lawrence Jenkins, Sir Maurice Guyer, Sir Bhashyam Iyengar, Sir Guroodas Banerjee, and later Justice Bijan Kumar Mukherjee, Justice Chagla, Justice Subba Justice H R Khanna, Justice Mathew, Justice Bhagawathi, Justice Krishna Iyer, to mention only a few come up to one's mind. But such instant recollections have an obvious disadvantage of subjectivity and selectiveness. Besides, by no means such an enumeration, let alone being exhaustive, can even broadly be illustrative of the great and meandering course of the development of law in any legal system. I must, therefore start with the prolegomena

that there are many judges of great distinction whose names I might, owing to the obvious limitations of space and time, omit; even so, the contribution of the contemporary judges to the development of the law has been significant. I have abstained from reference of their work, for, as Chesterson says :

"To judge about success or failure one must see things very simply; one must see them in masses, as the artist, half closing his eyes against details sees light and shades. That is the only way in which a just judgment can be formed as to whether any departure or development has been a benefit upon the whole. Seen close, such great erections always abound in ingenious detail and impressive solidity; it is only by seeing them afar that one can tell if the Tower leans".⁶ The great events in the march of law for a true assessment need to be seen from a distance of time, for, the proximity of time and closeness to events might impart an element of exaggeration either way, unless the perceiver shades his eyes from the glare of immediacy. The role of a judge in the traditions of the Common Law and in the interpretative process in constitutional adjudications is not anonymous. In consequence, the prestige of the judiciary becomes an important element in the process and acceptability of judicial law making.

A deeper analysis of the connection between law and religion, would indicate that 'religious jurisprudence has utilized religious doctrines as a means to an end, namely the justifying and systematizing of rules which on purely objective grounds had every reason for being enforced. In relation to the legislation of the personal laws of Hindus, the implications of this view are according to Derret, that legislation on topics of Hindu Law need not fear the charge of being sacrilegious and that Hindu

law as a system is no less than any system not nominally derived from religious doctrines, for comparative treatment by analytical jurists. Derret suggests that "the actual relationship between religious doctrines and the rules of substantive law is not that of cause and effect, but rather that of form and substance. The teaching of law and its judicial development cannot indeed dispense with formal theories and 'a-priori' arguments, but it is plain that the law as a living expression of justice can exist, and often does not exist, without their aid."

In an insightful study of the amenability of Hindu Law for reform in the context of the Law and Religion relationship, justice Chandrasekkara Iyer's Committee on 'Womens' Rights under the 'Hindu Law' (1930) said :

"the idea that essential divinity underlying all manifestation is to be traced no so much, if at all, in the rigidity of the passing forms, as in the free play of the informing life, applies to less to legal institutions than to other departments of human existence and must have been perfectly familiar to Hindu jurists who were also Vedantic scholars."

The Committee referred to the following observations of Sir Henry Maine :

"Brahmanical India has not passed beyond a stage which occurs in the history of all the families of mankind, the stage at which a rule of law is not yet discriminated from a rule of religion. The members of such a society consider that the transgression of a religious ordinance should be punished by civil penalties,

and that the violation of a civil duty exposes the delinquent to divine correction." And quoted Sir.Goordas Banerjee in answer :

While on the one hand, the belief in its emanation from the Deity made it in theory absolutely unalterable by any temporal power, on the other hand, the absence of temporal sanctions in the majority of cases, and the feebleness of its connection with temporal authority, rendered it practically a system most readily adaptable to the varying wants of society.

The Committee said:

"Non one but an obstinate fanatic will assert that it is perpetuate defects which may have crept into its legal and social institutions n the course of the ages. Sensible persons everywhere, those who live in the present and not in a cloudland of past traditions and prepossessions, cannot but admit that 'social institutions exist for man, not man for social institutions, and that the only social institutions which will work for any length of time are those which I are in harmony with individual human nature. Institutions which deny the facts of human nature either break down more or less violently, or else decay gradually into ineffectiveness."

V

Law in Plural Society

The purpose of law in plural societies is not the progressive assimilation of the minorities in the majoritarian milieu. What then is its purpose? In the words of Lord Scarman :

“the purpose of the law must be not to extinguish the groups which make the society but to devise political, social and legal means of preventing them from falling apart and so destroying the plural society of which they are members.”

The function of law and choice of legal policies in a pluralist society are by far the most fascinating challenges to our civilization. Large land-masses of the globe are inhabited by plural societies of one kind or the other. The challenges are pervasive and assail the basic assumptions of Justice, Democracy, Rule of Law, Minority of political authority, System of Government, the role of the judiciary etc....some them hitherto held fundamental or even axiomatic. They appeal to the immutable values of a higher social order. Man's capacity for a human law and human justice are put to its ultimate test. The ultimate question is whether civilizations on earth have the moral maturity to accept the human person as the unit and a measure of all things.

The question “what is justice” in the maze of the

irregularities of interest in pluralist societies "is an invitation to the most abstract sort of philosophical speculation" of its meta physical elements. What ready answers can be given to questions of our times such as "what makes a government legitimate? What is justice to the poor people living virtually next to people who have more money than they could never possibly spend? Is it fair that hard-working people of considerable talent to unrewarded, while others, smiled-upon by fortune and raised with wealth and power are constantly "rewarded" in return for no work and no contribution to society whatever? Do people whose ancestors were treated unfairly deserve compensation for what their grandfathers suffered? Can a legal system impose upon an individual the burden of personal sacrifice so as to ensure opportunity to others? what then should be done to equalize a condition of those with inherited disadvantages?

Lord Scarman asks much the same questions says:

"...it is a platitude that society must be just. But what in the context of a plural society do we mean by justice ? Are we seeking justice as between groups? Or do we remain true to our western philosophy that what ultimately matters is the right and duty of the individual human being and that 'justice implies for each one of us 'equal and under the law'..... to quote the inscription over the portico of the U.S Supreme Court building. Clearly we desire both justice under the law for every one of us. The dilemma of the plural society is that it is not always possible to achieve both. How, then, does

one regulate justly, the clash of interest between the group and the individual.”⁷

This is the in-built dilemma of all human organisation. We do ourselves no service by calling it evil. As Lord Scarman observed: “.....plural societies are the product of irreversible movements of mankind. Short of genocide or mass trans-portion, most of them are here to stay....” Pluralism is not a mere transient vestige of a historical condition but a permanent feature of the public culture of modern democracies.

The American's great achievements are symbolized by the legend of their seal “*E Pluibus Unam*” and attest to the great success it has made of its plural character. Its great achievements and the creative role of its judiciary are matters of particular attention and admiration. Its civil war proved the nation's determination.

Judge as a maker of Law

Justice Benjamin Cardozo when asked who amongst his colleagues in the Supreme Court was the ‘greatest living American jurist’ is said to have replied: “ the greatest living American jurist isn't on the Supreme Court”. He was obviously referring to Justice Learned Hand who in his judicial career spanning over half a century was reckoned the “tenth justice” of the Supreme Court. It was negligence of destiny, it was said, that denied the American Supreme Court of his stewardship. Similar debates as to choice also arose in Britain. When it was being said Lord Denning, the most influential judge of the century, Some others claimed that Lord Reid deserved that accolade. Denning was on his own reckoning was not a ‘timorous soul’ but a ‘bold-spirit’. He gave a new dimension to the

process of change in common law. Lord Ackner recounts an interview of Lord Devlin in which Lord Denning as 'a specimen tree and you must not have a whole avenue of it'. In setting-up criteria for the inclusion of a judge as a maker of Indian Law, one should take into account the enormous undulation of the Indian legal landscape. The system of customary law, the personal laws, the great volume of statutory law and the later implications of a justiciable Bill of Rights in the constitution and the range of constitutional adjudications impart an amazing dimension to the task. The trek in the wilderness of laws' territory is arduous. But then there is, as one discerns, a certain fine common thread that runs through the fabric of this process of identification of those who have helped it develop. Aharon Barak of the Supreme Court of Israel expressed this task in attractive personal terms. He said:

"I am not a philosopher. I am not a political scientist. I am a judge – a judge in the highest court of my country's legal system. So I ask myself a question that many supreme court judges – and, in fact, all judges on all courts in modern democracies ask themselves: What is my role as a judge?

.....But am I a "good" judge?"

"What are the criteria for judging the Justices who wrote opinions? This question is important not merely to judges who want to assess their performance, but to the system as a whole. The answer determines the criteria for developing the law and provides a basis for formulating a system

of interpretation of all legal texts. Establishing criteria for judging judges is particularly important in view of the frequent attempts to dress up political problems in legal garb and place them before the court."

"The questions I wish to consider are not new. They are as old as judging itself and they have accompanied various legal systems in their progressions throughout history. Sometimes they can be found at the center of public debate. Sometimes they are marginalized. The time has come to reconsider these questions. There are four main reasons for their timeliness:"⁸

The first of the four reasons for their 'timeliness' that the Chief Justice refers to was, quite obviously, the impact of the great global thrust towards democracy that the twentieth century witnessed. The second, is 'the not so quiet' transformation of what he calls "passive democracy" into a "defensive democracy". The third, is the increasing dividends from the movements to integrate other intellectual disciplines into law providing new tools for understanding the complexity of the judicial role. The fourth, is that a survey of de-facto status of the judicial branches in the various democracies shows that since the end of the Second World War, the importance of the judiciary relative to the other branches of the State, has increased. "People increasingly turn to the judiciary, hoping it can solve pressing social problems."

Lack of source material in India

Unlike in the west, in India the culture of judicial

biographies as a component of the study of development of law has not taken firm roots. There is therefore, lack of adequate source of this kind of material for a critical evaluation of judges' work and the creative role of the courts. Justice Powel, in his "Foreword" to Gerald Gunther's biography of Learned Hand spoke of the abundance of such resource in the United States. He said:

"... as a biographer's subject, Learned hand must inspire feelings of both gratitude and intimidation. Hand left his chronicler a rich source of material. In addition to thousands of judicial opinions and many public speeches, the great judge left a monumental correspondence with leading figures in law and letters, including Oliver Wendell Holmes, Jr., Felix Frankfurter, Walter Lippmann, and Bernard Berenson. So the Learned Hand Papers confront the biographer with the task of reviewing more than 100,000 items, an awesome physical task in itself. Happily, the honour of serving as Hand's biographer fell to Professor Gerald Gunther of the Stanford Law School."⁹

Great biographies of Holmes, Hand and Cordozo are a rich source. There are many works in England of evaluation of judges contribution to the development of law. Campbell's "Lives of the Chancellors" and "Lives of Chief Justices"; Martland's "Constitutional History of England"; Sir William Holdsworth's own excellent account of the "History of English Law"; important journals such as the Law Quarterly Review, Public Law and a large number of judicial biographies provide the source material for a

BCV 4119

study of the great influence of the early law makers in England. Pollock and Martland say: "nor can we part with this age, without thinking once more of the permanence of its work. Those few men who were gathered at Westminster round Pateshull and Raleigh and Bracton were penning writs that would run in the name of kingless commonwealths on the other shore of the Atlantic Ocean; they were making right and wrong for us and for our children"¹⁰

Sir William Holdsworth says:

"In fact this estimate of the geographical extent of their work is an understatement; for they were penning writs which would run also in the name of the King-Emperor on the shores of the Indian Ocean. The eastern and western expansions of England have spread English Law and English Language over the world. Just as from the twelfth to the sixteenth centuries the concepts and principles and rules of Roman law spread over Western Europe and influenced in different degrees the legal system of all its countries; so in India, the concepts and principles and rules of English Law have spread over the provinces and states of India."¹¹

Other works of importance are "Eminent Indian Judges by Brojendra Nath Mitter"¹² and Tagore Law Lectures on "Judiciary in India and Judicial Process" by Justice H.R. Khanna¹³, himself one of the celebrated names in the Indian judiciary for his striking judicial independence and as an upholder of democratic values and personal liberty.

In India there are a few biographies of judges. There are autobiographies of some eminent men of law. But writings that integrate the lives of judges and their judicial work as part of an integrated study of the development of law are not many. An engaging recent work is however by a professor of Anthropology, Partha Chatterjee, titled "Princely Imposter"¹⁴. This is a reconstruction of the famous trial of yesteryears in India, which had evoked wide attention and curiosity as the "Bhawal Sanyasi case". Though that was an over-done theme of the unusual elemental curiosities it could appeal to this scholarly work of Professor Chatterjee combines an excellent narrative with deeper insights into the nationalist political sentiments that gave the case an added dimension. Besides, the narrative is marked by an analysis of the back-ground and disposition of the judges who were concerned with the case at the different stages of its soujourn through the courts. The facts of the case themselves had their own strange and strong dramatic elements and had created a bit of sensation in its time. It related to the reported death in 1909 at Darjeeling of a young heir to the estate of Bhawal (now in Bangladesh) and his dramatic reappearance after 12 years with the story – later accepted by the courts – that he had been taken alive to the cremation ground, that by a fortuitous rain-storm the cremation was aborted and that by an equally fortuitous event some Naga Sanyasis who had rescued him from the cremation ground and had made him their own. He returned to the estate after 12 years asserting his identity and nine thereafter brought the suit which was vigourously refuted by his own wife. The trial lasted six years and over a thousand witnesses had been examined in his support. There was great public enthusiasm on his side, particularly from the tenant-

peasantry of the estate which was then under the administration of the court of wards. The trial judge, Panna Lal Basu, decreed the suit. The decree was affirmed in appeal by a split vote among three judges who constituted the appellate bench in the High Court. The Privy Council dismissed the appeals. But very soon thereafter the victorious zamindar fell dead as he was emerging out of the Kali Temple. Professor Partha Chatterjee's excellent work assesses the range and depth of the factual and legal issues which the case raised as well as the back ground of the decadent life – styles in the days of agrarian exploitation. Professor Chatterjee's is a gripping narrative and the work reminds of the reconstruction by Louis Nizar of the famous Rosenberg Trial in the United States of America.¹⁵

In the High Court Justice Biswas, one of the judges in the majority paid handsome tributes to the trial judge Pannalal Basu, who immediately after rendering the judgement had resigned from office. Both the judges, Basu and Biswas later became ministers, in Bengal and the Union of India, respectively. Professor Chatterjee's narrative refers to the similar case, but with opposite results, in England known as the 'Tichborne Estate case' Roger Tichborne, an heir apparent to the Tichborne estate, was stated to have been lost at the sea in South America and presumed dead. Thirteen years later, a man surfaced in Australia holding himself out as Roger Tichborne. His story, similar to that of the Bhawal Sanyasi. He claimed that after the ship-wreck he was rescued by an Australian vessel and transported to Australia where he claimed to have started a new life under the name Thomas Castro. When he began to re-assert his old identity as Roger Tichborne, Lady Tichborne, mother of Roger, seems to have accepted him. His supporters raised large sums

of money from the public on the assurance of repayment after his legal success. But the Court called him an imposter and ordered his prosecution resulting in the imprisonment of Thomas Castro for 14 years. The author's silent comment on the result of the Bahwal Case, implicit in the reference to the Tichborne case, seems a little too subtle !

Scope's trial, however, has become part of the folklore through the motion picture "Inherit the Wind" (1960). As, Bernard Schwartz says, what makes it great is that the trial helped sever the tie between the law and Christianity that had originally prevailed.

Law and Scientific Temper

As part of the theme of these lectures, diverse as they are is to trace the dynamics of the judicial process in the common law tradition under the influence of the libertarian political movements, such as democracy, Human Rights and science in changing the theological foundations of law to a broader egalitarian and rational foundations, technology, the broad sweep of the political and cultural movements. Modern mind, it is said, is the product of the seventeenth century science. That era saw the birth of modern science as it is understood today and was exposed to the thoughts of Kepler, Galileo and Newton. Newer speculations on creation and cosmology were put forward. There was the expected and inevitable confrontation between the 'teleological' and 'mechanical' theories of evolution. The dis-cerning of a purpose in evolution was considered unscientific. This scientific temper also militated against the religious concept of the world as a moral order and the declaration implicit in

it that moral values were objective. Modern science, postulated propositions which were in-consistent with moral values being objectives.

The Constitution (Forty Second Amendment Act 1976) introduced Part IV A, a chapter on Fundamental Duties of every citizen. Amongst those duties is 'to develop a scientific temper, humanism and the spirit of enquiry and reform. The thoughts and actions of me, said a scholar, are influenced by contemporary broad and general ideas about the nature of the world and the place of man in it. A set of general ideas of this sort may be called "world picture" which is often a mixture of contemporary views and beliefs on science, religion and morality. The progress of law has to absorb a generous mixture of all this. Therefore, those of us who have learnt humility" says Max Radin, "have given over the attempt to define law."

Sir William Holdsworth's Lectures

Sir William Holdsworth in his Tagore Law Lectures presented a biographical history of English Law, 'describing its flow through the lives of its principal makers'. Sir William referred to the contribution of the great common lawyers who influenced its growth; from Littleton, Fortescue, Edward I (in whose time the foundations for the organization of legal profession was laid), St. Germain, Sir Thomas More, Ellesmere, Bacon, Sir Edward Coke, Sir Mathew Hale, Sir John Holt, Mansfield and others. The lectures of Sir William unfold the fascinating stages in the evolution of those great principles and institutions that led to the consolidation of a coherent system which was later to exert a great influence on the legal systems of the world. The struggles of the Parliament against the Kings was

meaningful because of the impetus the common lawyers gave to it. The 'glorious bloodless revolution' of 1688 resulting in the Bill of Rights for which a great lawyer and judge, Sir Edward Coke, had laid the foundation, ironically, became it itself the source of the doctrine of the Supremacy of Parliament. Sir Edward Coke 'had earlier in 1628 taken 'the largest part in the framing of and carrying through the Petition of Right'. Coke was suspended in 1616 as a result of his unsuccessful encounters with Lord Ellesmere. Coke's judicial tenure came to an abrupt end in 1616 and in November that year he was dismissed. He died on 3rd September 1634. But after demitting the judicial office he led a relentless battle for those great values to which the later generations owed so much. The Petition of Rights 1628 is a monument to his indefatigable work for the protection of the rights of the subjects against executive tyranny. Sir William records that, just as the Tudor statesmen succeeded in adapting the medieval institutions of the English state to modern needs, without any appreciable sacrifice of the medieval ideas contained in them, so did Coke succeed in remoulding the medieval common law in such a way that it was made fit for the modern English state. As a lawyer and a statesman he belonged to the greatest period of the Tudor dynasty – the Elizabethan age ; and so, 'like many of the other great leaders of thought and action in that age, Coke was 'the author of much in our national life that we still rightly treasure. What Shakespeare has been to literature, what Bacon has been to philosophy, what the translators of authorized version of the Bible have been to religion, Coke has been to public and private law of England". This is high praise; but richly deserved.

Professor Bernard Schwartz's 'Makers of American Law'

In the mid-eighties, Professor Bernard Schwartz delivered Tagore Law Lectures on "Some makers of American Law" of Professor Schwartz was the American counterpart of Sir William's presentation. It was intended as a history of development American Law through the lives of eminent American jurists. The significance and validity of such an approach to legal history, with an emphasis on the lives of great minds of law is, of course still a matter of debate. Speaking of it, Bernard Schwartz himself says:

"It will, However be said that presentation such as this, with its emphasis on the lives of great men who made a legal system is out of place in an age in which the world of law, like that physics, is perceived only as the relativity of one value compared with another. In such an age, we seem to be afraid of greatness and look with suspicion on an account that emphasizes anything but the mode in the historical eye. Laudatory history today seems as out of date as the flamboyant rhetoric of a century ago."¹⁶

Yes. Though we 'no longer look on the past with Burkean veneration, we need not go to the opposite extreme'. Bernard Schwartz indicated the great significance of the contribution of the lawyers at independence'. George Mason, John Adams, Madison and the later great judges animated the spirit of the constitutional document by filling its inter-stices with life and blood. Professor Schwartz also evaluates the contribution of the early masters of common law. He lists John Marshall, Oliver Wendell Holmes, Earl Warren, Joseph Story, William J. Brennan, Jr., Louis D Brandeis, Charles Evans Hughes, Hugo Lafayette Black,



Stephen J Field, Roger Brooke Taney as the ten greatest judges of America in that order.

LECTURE I

CHAPTER NOTES

1. Budha Singh Vs Laltusingh : AIR 1915 P.C. 70. I am indebted to Sri. B.Venkatakrishnappa's fine article on 'Karnataka's Contribution to Hindu Law'. The author of the article says: 'An interesting fact is quoted in MN Srinivasan's Hindu Law Book. It is stated that Sir W W Hunter in the Imperial Gazetteer of India has observed in the 1886 Edn. Vol IX at page 266 that Vijnaneshwara wrote his treatise at Malur in Magadi Taluk of Bangalore District. This astonishing fact has so far not been investigated though the credentials and sources of information in the Imperial Gazetteer are impeccable.'
2. Kamalammal vs Venkata Lakshmi : AIR 1965 SC 1349, Surjithlal Chabda vs. Income Tax Commissioner, AIR 1976SC 109.
3. *Ibid* : Professor Venakatakrishnappa.
4. Collector of Madhura vs. Mootu Ramalinga :12 Moore's Ind. Appeals 392
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Lecture II

THE JUDGE- IMAGE AND QUALITIES

Popular image of a judge

What makes a good judge? In a 1993 American survey on what makes great judges, many lawyers, judges and students responded. What the group agreed upon as common qualities were "intellectual ability" and "ability in writing". Lawyers and students identified ability and protection of individual rights as the true test of judicial greatness; but the judges and scholars emphasized 'leadership'. True, "most judges", in the words of Justice Holmes, "had no wings and were not thunderbolts but very honest and hardworking judges." Justice Holmes once said of "both skeptic and the worshipper alike, agree that if American law were to be represented by a single figure that figure would be one alone and that was John Marshal."

Claims to greatness are not the fortunate lot of many but then every nation should be judged by the best it has been able to produce. An American judge said that to see his Chief Justice preside over the Court was like witnessing 'Toscanini leading an orchestra'. Henry Cecil recalls the Orwellian image of a judge. "the hanging judge – that evil old man in scarlet robe and horsehair wig, whom nothing short of dynamite will ever teach what century he is living in, but who will at any rate interpret the law according to the books and will in no circumstances take

a money bribe — is one of the symbolic figures in England”¹ The fairness and in-corruptibility of the English judge was a proud national English reputation. An upright bench, as he says, is ‘one of our few remaining envied possessions’. Judges, as some one said, are often mistaken, sometimes imprudent, occasionally stupid but always incorrupt and incorruptible.’ On the lighter side, Peter Hay quotes a nameless ‘wag’ who defined a perfect judge: ‘He should be about sixty, clear shaver, with white hair, china-blue eyes, and hemorrhoids so that he will have that concerned look!’ Birkenhead in his preface to “Fourteen English Judges” said :

“If and when I find leisure to complete my work, I will, in its preface, for the benefit of anyone who attaches the slightest importance to my opinion, attempt to make plain who, and in what order, are in my judgement the ten greatest Judges who have interpreted Law in the Courts of this country.” When asked by News-paper men to set out a list, in the order of their greatness, of judges he admired most, Birkenhead said: “This task would be rather like that of suggesting the strongest cricket side which could be formed, if you were allowed a selection from all cricketers who have ever played that game in Great Britain or in Australia.”²

Bernard Schwartz's Ten Great American Judges

One might recall here that some seventy years later, an American Professor, Bernard Schwartz made such a

list of ten great American Judges in his "Book of Legal Lists". He asked "who are the top ten Supreme Court judges and why does each deserve his place at the judicial apex.?" He observed "To be sure, any such ranking is a personal matter, bound to be based on the lister's own subjective evaluation. After all, as Justice Felix Frankfurter pointed out, Greatness in the law is not a standardized quality, nor are the elements that combine to attain it. There are no objective standards of comparison between Justices, — no batting averages like those that distinguish the Ty Cobbsees or Ted Williams from their lesser counterparts."³ Schwartz listed the ten great judges: John Marshall, Oliver Wendell Holmes, Earl Warren, Joseph Story, William J. Brennan, Jr., Louis D Brandeis, Charles Evans Hughes, Hugo Lafayette Black, Stephen J Field, Roger Brooke Taney, in that order. Schwartz also went out to list the ten 'worst' American judges.

Justice Lewis Powell described the physical and physiognomic attributes of Learned Hand:

"Popular fascination with Hand can be attributed to his appearance and his colorful personal character: his rugged square features and imposing eyebrows became the public's ideal of what a judge should look like, and his imposing courtroom manner could strike terror into the heart of any young lawyer. I can attest to the latter from experience, having sat beside a senior partner from my firm in an argument before Hand during my early days in practice"

And added :

"Hand was also a devoted father, and

delighted in making up outrageous stories for his daughters. In later years he amused his grandchildren by placing a wastebasket over his head and leaping around the room in the role of an Indian warrior.⁴

But Justice Lewis Powell added that the biography of Hand's life was "not to be found in the amusing anecdotes. His fame and his place in his history rest largely on his approach to the task of judging and on his perception of the judicial role in American government."

Like wise the biographer of Justice Oliver Wendell Holmes said:

"Holmes was also an enticing personality. He was exceptionally attractive, especially, as he aged and his countenance, with its piercing eyes, stock of white hair and prominent moustache, seemed to reflect the role of soldier and jurist that had been so important in his life. He was by all accounts a memorable companion and conversationalist and his letters, in contradistinction to those of most of his judicial colleagues, rival those of the most celebrated correspondents in their stylistic facility and substantive interest. Holmes of course was a charismatic personality."⁵

Justice Frankfurter was said to be a great admirer of Justice Holmes. He brought out a festschrift on Justice Holmes's 75th birthday. Justice Holmes according to Justice Frankfurter was the 'profoundest intellect who had ever dispensed Anglo-American justice. The gifts of nature had showered on him – the handsome face and distin-

guished presence, the noble voice and charming manner – were accentuated by his long, dashing career which enveloped him as though in a romantic aura.”

However, there is no judge otherwise great and learned, whose views sometime or the other has not gone against the better judgement of the community. Justice Holmes himself was no exception. In his opinion in *Carrie Buck Vs Bell* he emerged ‘a confused eugenic reformer’. When he upheld the law authorising compulsory sterilisation of mentally defective persons he took the view that the principle that sustains compulsory vaccination was broad enough to cover the ‘cutting the fallopian tubes’. He observed in his opinion that Carrie Buck who challenged the law was “a feeble minded white woman who was committed to the State colony in due form. She is the daughter of a feeble minded mother in the same institution and mother of an illegitimate feeble minded child” and declared “three generations of imbeciles are enough.”.. Paul Lambardo’s “Three generations and no imbeciles: A new light on ‘Buck Vs Bell’” was critical. But the intensity and the range of the intellectual interests of Justice Holmes, his legal philosophy and literary and legal style blazed a trail. ‘To discuss Mr. Justice Holmes’s opinions’ said Justice Frankfurter ‘is to string pearls’. Holmes’s aphorism ‘life of law is not logic but experience’ acquired the sanctity of a legal theology. It is perhaps a little unfair to lesser judges to be pitched in comparison against this grand vicar of the common law.

But the scope of these lectures is not the grand vision of the legacy of Holmes through Indian eyes but to set a frame for the image of a judge in the common law tradition; and to assess the great transformation the Indian law has undergone over the past two centuries through the work of law reformers, lawyers, judges and social reformers.

Some eminent judges in the Indian Courts

The Indian judiciary has produced many eminent judges of remarkable judicial stature. Some are well known and famous; a few of them remained hidden from limelight. I should like to recall here, one such. It was Justice S.S. Setlur of the High Court of the Princely State of Mysore. The judgments of the Privy Council, *proprio-vigore*, were not binding in the State which was princely state. The Privy Council had laid down in a series of pronouncements culminating in *Brij Narayan vs. Mangala Prasad*⁶ that the Hindu Law Doctrine of Pious Obligation of a son to discharge the debts of the father arose even during the father's life time. In contrast a Full Bench of the Mysore High Court⁷ held that there is no obligation on the son during the father's life time. Justice Setlur explained that the son's liability would arise after the father's death. West and Butler in the 'Hindu Law' and Sir Dinsha Mulla in his first edition of the 'Hindu Law' had stated that the Smriti texts (apart from a lone exception of Brihaspati) had laid down about the son's liability arising after the father's death. Justice Muthusami Iyer had also taken the same view in the Madras High Court. However, in 1952 the Supreme Court in *Pannalal vs. Narayani* affirmed the view of the Privy Council. The question was whether the Hindu Law as expounded in the South was covered by the Pannalal principle. A later Full Bench of the Mysore High⁸ Court referring to the principle of Article 141 and Article 261(2) of the Constitution held it out to be more appropriate to follow the principle laid down in Pannalal's case. Justice Setlur wrote a book on the 'Hindu Law of Inheritance'. He was a nationalist which, it would appear, did not go well with the British rule. Justice Setlur's judicial career was cut-short.

In India, the High Courts were established in 1861 under Indian High Court Act 1961. Sir Charles Wood, the Secretary of State for India in his dispatch accompanying the Letters Patent for the High Court of Calcutta said:

"The Crown by its Letters Patent has sanctioned the establishment of a tribunal as the Chief Court of Justice in India, which in the trained learning of judges selected from the Bar and in the knowledge of the language, feelings and habits of that country possessed by other members of the Court, combines the most material element of success."⁹

In the ancient Indian tradition the qualifications for a judge was exacting. Judges were first and foremost required to be honourable men of proven integrity and versed in the sacred laws, who are prudent, noble and impartial. In S.P. Gupta's case, Justice Venkatramiah referred to these attributes. The Law Commission of India stressed these attributes. "The service rendered by judges demands the highest qualities of learning, training and character. These qualities are not to be measured in terms of pounds, shillings and pence according to the quantity of work done. A form of life and conduct far more severe and restricted than that of ordinary people is required from judges and, though unwritten has been most strictly observed. They are at once privilege and restricted. They have to present a continuous aspect of dignity and conduct."¹⁰ The Law Commission cautioned that 'Heavily will our society pay in an epoch where our relative material power has diminished, if we do not sustain those institutions for which we are renowned'.

It is said that successful lawyers "accustomed to contest in the arena of justice would find umpiring it a tame affair, because the judge cannot experience either triumph or defeat. He can only impose it. True, he has the exhilaration of scholarship and writing, but these are not denied to the lawyer. Indeed without them he can neither be a successful office lawyer nor an advocate." Loius Nizer spoke of a leading trial lawyer who went on the Bench and when asked how he liked his new duties, he is reported to have confessed: "I am quite not sure. The trouble is I don't know which side I'm on". But sadly "The honour of these posts is drained by the debased standards of reckless and crude criticism which now pervades the political scene."¹¹ A lawyer in England who accepted a judgeship after an experience of the hard work it entailed, is said to have exclaimed "I thought slavery had been long abolished in England".

The 20th century has witnessed the phenomenal growth and ramification of Government as a Welfare State and the consequent explosion of the legal and administrative expedencies for implementing the new found social and economic aspirations of the State that created the need for resolving problems in administering this new area of State's role. Administrative law became vital to the proper adjudication and resolution of complex disputes, quite often involving specialized technical matters, between man and man, between man and State. The problem was to "strike the right balance between efficient government on the one hand and the protection of the citizen against misgovernment on the other" This balance has been struck by 'some of the more sensational judicial exploits. Prof. Wade in his Hamlyn Lectures on "Constitutional Fundamentals" observed :

"....30 or 40 years ago judges questioned about administrative law were prone to say that their function was merely to give effect to the will of Parliament and that they were not concerned with policy. In reality they are upto their necks in policy, as they have been all through history, and nothing could illustrate this more vividly in our own time than the vicissitudes of administrative law. In the period of their backsliding they decline to apply the principles of natural justice, allowed ministers unfettered discretion where blank-cheque powers were given by statute, declined to control the patent legal errors of tribunals, permitted the free abuse of Crown privilege and so forth. Then in 1960s, when the public reaction against administrative injustice had become too strong to be ignored, the judges executed a series of U-turns which put the law back on course and responded to the public mood."

Prof Wade further says :

"When Lord MacDermott gave his Hamlyn Lectures in 1957 he had to lament the fact the principles of natural justice did not apply to administrative action. The House of Lords held that this was entirely wrong, one of the great judicial delusions of the post-war years. Ridge V. Baldwin reverberated round the British Commonwealth where many judges had been perplexed by the unwill-

ingness of our courts, including the Privy Council, to require the observance of natural justice in administrative cases. A torrent of litigation was then generated in which the courts had not only to define the principle but also to work out the details, dealing with the right to know the opposing case, and whether there is a right to legal representation, cross-examination, and so forth. The law is still developing, but the important thing is that the courts once again accept, as they had always done except in their period of amnesia, that part of their duty was to require public authorities to respect certain basic rules of fairness in exercising power over the citizen."¹²

The nature of the judicial role has profoundly changed over the years. Judicial law making has come to stay. Where a judge in the common law tradition decides disputes inter-parties, he also lays down or re-affirms a principle relevant to the on-going judicial process of resolving future cases. These complex functions of a judge cannot be performed without public faith in the judges. Cordozo said that the personality of the judge is the ultimate assurance of justice. The constitutional promises become a mere collection of empty words when they remain unenforced. Equality is the pivot on which the grand machinery of democracy turns. It is a great judge who lends judicial authority to these aspirations of a self governing people.

I may refer to only to two shining examples of judicial honour at the formative years of the Indian judiciary as

we know it today – one from the South and the other from the North : Sir T.Muthuswamu Iyer and Sir Ashutosh Mukherji. A British Barrsiter paid the following – perhaps the most beautiful any lawyer has paid to judge—to Sir. Muthusami Iyer :

"I have touched upon Muthusami display this more markedly than in his dress. He always walked into court bare-footed. He always sat without anything to cover his feet except the diaphanous fold of his white muslin cloth. Under his silk gown he donned, it is true, a black alpaca coat; but on his head shone all glory of a goldlaced turban, accentuating the circular Smartha wafer which reposed between his eyebrows. No collar disfigured his neck. Round his ebony throat glistened the folds of a much – encircling white tie, which towards the close of the day, after the heat of a more than usually knotty legal argument by slow degrees worked one of its end upwards and behind one of his ears. Muthusami would meantime sit with one eye shut, his head askew, with the feathered tips of his quill pen between his lips, smiling, cogitating, watching, waiting for his spring, while as his brain closed upon, grasped and strangled some of the audacious proposition of law with regard to the position of Bhandus, the legal status of a sister's son, or the exact inheritable virtues below, clutching, unclutching themselves as though they were

seeking for the antagonist's throat, an index and a reflex of the intellectual spasms through which their owner was passing higher up. I used to watch those convulsions, I remember, with anxious tread, awaiting the time for my execution. When the great toe of the Judge's right foot leaned over and seized the toe adjacent to it we all knew that further argument was over and the case was lost. The judge had made up his mind. There was nothing left to do or to ask for not even costs." ¹³

"Sir Muthusami Iyer, great as a judge, was even greater as a man. Indeed in South India, his name has become a household word. Parents tell their children stories of Muthusami's early struggles and final triumphs; of his rise from abject poverty and obscurity to affluence and great renown; of the simplicity of his life and the truthfulness of his character, his diligence and integrity, and above all his piety and devotion to duty."¹⁴

Indeed, as Mr Eardley said of Sir. Muthusami Iyer that he was "used as the break-horse of the Bench. Each new judicial colt was harnessed to him and he pulled the neophyte round dangerous corners, forced him to trot instead of gallop in the straight and never knew he was shaping all the while the lives of future knights".

Of Sir Asutosh Mukherjea was a great judge; Sir P.S.Sivaswami Iyer said:

"In ability, erudition, and strong common sense, he was easily the foremost among the judges of the Indian High Courts. The days of

English Judges who were great jurists and made marked contributions to the growth of law were probably gone forever in India. If we wish to appraise the merits of Sir Asutosh Mookerjee, he must be tried, as he himself would have wished, by the very highest standards. It would be doing him poor justice to institute a comparison between him and the rank and file of Judges of our rather overcrowded High Courts at the present day. Two great characteristics of Asutosh as a lawyer was his vast learning and his prodigious industry. He was not content to confine his search for principles to the usual repertoires of Indian or English decision. His quest for principles took him far afield to the decision of American Courts, not merely of the Supreme Court but also of the State Courts and to the decisions of the highest courts of colonies. The habit for turning for light to the American case-law and jurisprudence was first started in India by Sir S. Subramanian Iyer. Sir Asutosh improved upon his example and revelled in the citation of American authorities — a practice beset with danger in the hands of less discriminating followers. It may also be stated that no other judge in India had so many varied interests making such enormous demands upon his time."¹⁵

Great tributes have been paid to Sir. Asutosh Mukherjee as a man, and as a judge. His dedication to the cause of education and governance was equally great. Writing on him an editorial said :

"It is a pity that Nature bestowed upon Sir. Asutosh all those great qualities which beautify a character and inspire a generation but failed to clothe his mortal frame with physical immortality. In the sudden removal of this great man who was for our age the nearest ideal to the perfect leader, we are unkindly reminded of the close proximity to Death of Life – a life so vigorous and so lively.

The nation honoured him in life. But in fairness to truth his contemporaries criticized him more. In death the mist created by passion or prejudice has been cleared and the bare glimpse of the towering peak that has suddenly lost its base has made the nation realize in gloom and despair the greatness of the man lost to it forever.

In the national mourning of Sir. Asutosh – inspired by the same genuine sorrow which is kindled by a personal bereavement – we feel to some extent an adequate measure of his greatness. But surely in this hour of despair Death has 'made him but greater seem not greater grow'.

His career so versatile – his character so complex. It is difficult to dwell on them with any attempt at fair justice. What was the secret of his power? It was not merely his impassioned energy, his wonderful erudition, his creative power, his organizing talent, his unlimited capacity for work that

explain his success but something else. To our mind, the answer is synthesis, as word which he and his colleagues used so often in their monumental report on the Calcutta University. It is happy synthesis between the East and the West, between idealism and practicality, between nationalism and universalism, between self-assertion and self-humiliation that explains the greatness of the man and the strength of his unique character. He was a nationalist.

The Current mood

The judges evoked enormous public respect and admiration. Lord Hewart acknowledged with satisfaction "the almost universal admiration in which judges were held." Another English judge felt "English Judiciary was treated as a national institution and tended to be admired to excess. Even the English Press has had high praise for the English judge: "by and large we would regard him as humane, understanding, with a far greater insight of human frailties and cupidity than might appear to some people. His grasp of complex issues and ability to present them simply to a jury is an endless source of wonderment. The British Judge deserves to be the envy of the world"

But this image of a judge has suffered greatly since earlier this year. In the month of May 2003 London's "Daily Express" carried a blistering attack by the Home Secretary against the judiciary and sought root and branch reform. The same mood is prevalent elsewhere too. It is in some sense an expression of the sadness of the society that one of its great institutions they could always

look for succor from executive excesses is falling. Code of interaction amongst judges was honour, dignity and fraternity. Justice Rehnquist remarked that where he first joined the court he felt as if he was entering a monastery. Justice Douglas recalls in his memoirs the difficult days of his confrontation with the executive when there was an attempted impeachment. He recalls an anecdote which was a refreshing gesture from a brother judge. After the impeachment proceedings were over and closed, in fact more than a year later, Huho L. Black, Jr., who practices law in Florida, talked with me on a visit to Washington, D.C. He said that while the matter was pending before the House, several Southerners came to him asking if he would not sound out his father concerning their plans to remove me from the court. Young Hugo took the matter up with his father, who said, "I have known Bill Douglas for thirty years. He's never knowingly done any improper, unethical or corrupt thing. Tell his detractors that in spite of my age, I think I have one trial left in me. Tell them that if they move against Bill Douglas, I'll resign from the Court and represent him. It will be the biggest, most important case I ever tried." The message brought tears to my eyes, for by then Justice Black had died and I had never the chance to thank him."¹⁶

The functions of a judge is an elevated one always in view of the lofty ideals they have to uphold. Bernard Schwartz lists the motion picture 'To Kill a Mocking Bird' as amongst the best ten legal movies. The lawyer hero, Atticus Finch, beautifully portrayed by Gregory Peck, in the course of his defense of a black American tells the court, although he knew it to be useless, against the raging bias of race – his version of American ideal :

"there is one way in this country in which all men are created equal – there is one human institution that makes a pauper equal of a Rockefeller, the stupid man the equal of Einstein, and the ignorant man the equal of any college president. That institution, gentlemen, is a court. It can be the Supreme Court of the United States or the humblest J.P. court in the land, or this honourable court which you serve. Our courts have their faults, as does any human institution, but in this country our courts are great levelers, and in our courts all men are created equal"¹⁷

That is a film which Bernard Schwartz says taught the difference between right and wrong, justice and injustice and courage in the face of the world and character 'even in the day, when law has become more a business than anything else.'

Liberty it was said, 'is not for the timid men who prefer the calm of despotism to boisterous sea of liberty'. Under the protection of the judiciary the poor, the timid and the wretched shall inherit the earth.

Lecture II

CHAPTER NOTES :

1. The English Judge- The Hamlyn Lectures, p.1.
2. Birkenhead: Preface to "Fourteen English Judges".
3. Bernard Schwartz: "Book of Legal Lists".
4. Govey Gunther : Judge Learned Hand" Preface by Justice Powell.
5. Edward White: "Oliver Wendell Holmes".

6. AIR 1924 PC 50.
7. See Kala vs Javeregowda :(1910) 15 Mysore Chief Court Reports 233 (FB)
8. See: Huchathimme Gowda vs Dyavamma 32, Mysore Law Journal p 33.
9. Brojendra Mitter : "Eminent Indian Judges"
10. Constitutional Law of India : Vol 3: H.M.Seervai, 4th Edn.p 2616.
11. Reflections without mirrors : Louis Nizer page 267, 269)
12. "Constitutional Fundamentals" Hamlyn Lectures, Prof Wade.
13. Brojendra Mitter : "Eminent Indian Judges"
14. Ibid
15. Ibid
16. "My Court Years" Justice Bill Douglas
17. Bernard Schwartz: "Book of Legal Lists".



Lecture III

INDIAN LEGAL SYSTEMS AND THE INHERITANCE OF THE COMMON LAW

Ancient India : Polity and the legal Systems

There are dependable historical accounts of the nature of the polity and of the institutions of administration of justice in ancient India. They all provide graphic and impressive details of the political structure and the legal systems in ancient India. In his Tagore Law Lectures 1950 on the "Evolution of Ancient Indian Law" Dr. Nares Chandra Sengupta provides, with the thoroughness of a meticulous scholar, description of institutions of administration of justice in ancient India and of the substantive and procedural aspects of the law administered in and through them. In an excellent work Beni Prasad gives an account of the nature of polity in ancient India. Democratic and Republican systems were not unknown in ancient India which was 'studded with republics' and even where there were monarchies, they were either elected or limited. Dr. Radhakrishna echoed this in the constituent Assembly. He said:

"we cannot say that the republican tradition is foreign to the genius of this country. We have had it from the beginning of our history. When a few merchants from the north went down to the south, one of the Princes of Deccan

asked the question: "Who is your king?" The answer was "Some of us are governed by assemblies, some of us by kings."

King As Judge

Speaking of the administration of justice, Dr.Nares Chandra Sengupta says :

"Definite history of the evolution of law proper starts with the emergence and growth of the King as judge. As we have seen, in the earliest stages of the society in ancient India administering justice between persons was the function of the social groups of Kulas and guilds. But already, in the earliest Dharma Sutras we find the King's administration of justice firmly established as an important function of the King."

"But we may note at once that the King in Vedic times had not the overwhelming might and personality that he acquired in later literature. From Manu in its present form, onward, the King is deemed to be a god himself, Vishnu himself in human form; he is made up of parts of eight great gods and therefore a person who must be implicitly obeyed. Yet in early law the concept of the divine personality of the King seems to be entirely absent."¹

The judicial authority of the King, initially was not his divine personality but upon positive law. He had to ascertain the law that he sought administer from

authoritative sources. But formal association of acknowledged experts in the actual discharge of the functions of the king as judge was a later development. In later texts the office of what is known as 'Pradvivaka' is mentioned. Dr, Sen Gupta adds: "In later law, as we shall presently see, the Pradvivaka is a permanent judge who rises to even greater importance in the end, but in this text he seems to have been mentioned only as a person who performs the subsidiary function of examining witnesses."² The kings more important concerns were with the maintenance of law and order and punishment for crimes.

Dr. Sen Gupta further adds:

'As the judicial functions of the King grew, we find a two fold development. In the first place, the obligation of the King to know the law from competent authorities was crystallized into a definite constitutional authority to advise the king in the shape of the King's sabha and secondly, the judicial authority of the king came to be delegated to permanent judges.'³

"But besides these appointed or *niyukta* members of the sabha any learned Brahmana who came in would be invited to take his place in the Sabha and it would be his moral duty and right to give his opinion like-wise. The function of the Sabha in respect of the litigations was of course advisory like that of assessors but, naturally the King would follow his advise as a rule".

"As administration of King's justice grew in volume we find later texts going into greater details about this Sabha. One important development was the inclusion of the merchants in the Sabha."

"In the later texts of Narada and Brihaspati the judicial functions are found to be exercised by the Pradvivaka. Pradvivaka is mentioned in much earlier texts and also in Guatama Dharma Sutras. His function then seems to have been that of a chief or chairman or foreman of the Sabha. His duty was originally performed, while the King himself presided over the Court, asking questions to witnesses and giving his opinion."⁴

There were elaborate procedural rules for the conduct of the trials – both civil and criminal. There were rules regulating the pleadings, written statements, details of points of dispute, recording evidence and rendering of verdicts. Indeed Dr. Sengupta refers to the elaborate rules of judging the demeanor and credibility of witnesses.

Influence of Political Changes on the Legal System

The fortunes of these systems of administration of justice in India depended on the continuance of the political organizations of which they were a part. The changes that came over these institutions were the consequence and impact of the political events that followed political and military conquests. The Muslim conquest brought in other institutions some of which were by no means arbitrary. There are recorded instances of the great sense of justice

and fairness with which they were administered. The most telling influence which brought in far reaching and permanent changes was the advent of the East India Company, though the French and the Portugese introduced and administered their civil law systems in parts of the country over which they wielded their political or military authority.

East India Company and the Advent of Common Law

Western law has two great systems, 'the civil law and common law'. The system of Civil Law comprises a number of national or local laws each of which has as its core a civil code based largely on Roman Law. The Common Law which is not contained in a code but is continually being distilled from the stream of a large number of cases decided by the courts of law, at first exclusively in England, but later in other parts of the Common-Wealth and United States of America. This judge-made law is again divided into two parts, which bear the technical names of Common Law and Equity, both of which are from time to time modified by national or local legislation.⁵

The influence of the common law lawyers on the spread of this system has been profound and remarkable for 'the extent of the earth's surface to which it was destined to sway'. Referring to the phenomena Sir William Holdsworth says:

"In fact this estimate of the geographical extent of their work is an understatement; for they were penning writs which would run also in the name of the King-Emperor on the shores of the Indian Ocean. The eastern

and western expansions of England have spread English law and the English language over the world. Just as from the twelfth to the sixteenth centuries the concepts and principles and rules of Roman law spread over Western Europe and influenced in different degrees the legal system of all its countries; so in India, the concepts and principles and rules of English law have spread over the provinces and states of India.⁶

Even the four centuries of Roman Rule could not significantly change or 'even flavour the land and people of the island it ruled'. As F.J. Haverfield put it, the Roman occupation left 'little permanent mark on the civilization and character of the island. The ruins of their forts and the fortresses are on our hillsides. But Romans as they were, their garrisons did little to spread Roman culture here.....'⁷ Sir Edward Coke in his commentary on Littleton described the laws of England as the "golden metwand whereby all men's causes are justly and evenly measured. Indeed Littleton's work was a master-piece. 'Coke on Littleton' was a master-piece on master-piece."

In the course of the debates in the Parliament on the 42nd amendment of the Constitution the then Law Minister Gokhale reportedly said: "law is one generation behind, lawyers are two generations behind and the judges three generations behind." The adaptability of common law is said to be answer to the inadequacy of the tardy pace of reformatory legislations. Law, it is said, is a 'notorious laggard', it does not reach out like science and medicine'. It awaits social consensus to pave its way. Social consensus itself is far behind the needs of times

and by the time legislature tries to catch up, the situation needing legislative intervention would itself have undergone a change. The judicial law making is, therefore, seen as the effective systemic ameliorative substitute.

Sixteenth and Seventeenth Century in England: Period of Transition

16th century in England was a century of transition from medieval to the modern. It saw many changes in all branches of private law. "A great deal of re-statement was needed to bring the medieval and the modern rules of that law into harmony. In fact, in any age in which fundamental changes have taken place, the law will need reconsideration and restatement; and it is not one of the least of the advantages of the system of common law that it enables lawyers to adapt the law to a new environment."⁸ Coke's writings was recognised in his own day by Bacon : "had it not been for Sir Edward Coke's reports...the law by this time had almost been like a ship without ballast; for that the cases of modern experience are fled from those that are adjudged and ruled in former times"⁹. Sir William Holdsworth pays the following tribute to Sir Edward Coke, whose work is the fitting culmination of a process that had commenced in the 12th century.

'We have seen that one of the most decisive events in the history of our constitutional law was the fact that Coke, after his dismissal from the bench, became a leader of the Parliamentary opposition. It was a decisive event because it cemented the old standing alliance between Parliament and the common law. In the middle ages and

in the sixteenth century the lawyers had helped to make the English Parliament an efficient representative assembly. In the seventeenth century Parliament handsomely repaid this debt by helping Coke to maintain the medieval conception of the supremacy of law, and to apply it to the government of a modern state. In this matter also England became a model both to the framers of the constitution of the United States and to the framers of constitutions in continental states."

The establishment of the rule of the law was mainly due to Coke's insistence on supremacy of common law. Its acceptance by later generations of lawyers, as fundamental principles of English law, was due to the manner in which he had stated and enforced them in his writings. Coke succeeded in re-moulding the Medieval common law in such a way that it was made fit to bear rule in the modern English State. He belonged to the greatest period of the Tudor dynasty – the Elizabethan age, and earned the accolade: 'what Shakespeare has been to literature, Bacon has been to philosophy, what the translators of the authorized version of the Bible have been to religion, Coke has been to the public and private law of England.'

Inquisitorial and Adversarial Systems : Competing Demands of Justices and Certainty

Implicit in the distinctions between the Common-Law and the Civil-Law systems are some of the deeper competing issues between the Adversarial and inquisitorial

forms; the value of precedents and of judicial law making. The arguments on either side indeed reflect the inevitable dilemmas of any judicial system: the problem of reconciling the competing demands of "justice" on the one hand and of "certainty" on the other. Rules intended to do justice in all cases would require them to be of great size and complexity. Even then, the difficulties that might actually arise in the future cases cannot exhaustively be foreseen and, therefore, the formulation of rules comprehending every future situation to which their application may be needed is nearly impossible. Every system, therefore, seeks to develop, and seems to need, some means whereby the special demands of justice of a particular case could be met justly. This, in turn, implies an ad-hoc decision making. The development of principles of equity in English Law which initially was a system of justice from ad-hoc interventions of the Chancellors in England. The main function of all courts is the adjudication of disputes. In England their origins are traced to community assemblies or "moots" which dealt with disputes according to local custom. At the centre was the Curia Regis (Kings Court). From this evolved, from time to time three common law courts, : namely the Exchequer, the Court of Common Pleas and King's (or Queen's) Bench. They sat at Westminster Hall. The jurisdictional lines between these courts were indeed complex. In theory, the Exchequer dealt with matters concerning the revenues of the Crown; the Common Pleas with suits between man and man; the King's Bench dealt with "pleas of the Crown" namely criminal matters and civil cases involving a breach of the King's peace or some other royal interest. There was subsequently a general re-organisation under the Supreme

Court of Judicature Acts(1873-75). In the reorganisation the various superior courts were replaced by one Supreme Court of Judicature comprising the High Court (in five divisions) and the Court of Appeal. "The intention initially was for the appellate jurisdiction of the House of Lords to be abolished, but a successful rearguard action was fought for its retention." Dr. Jackson "Machinery of Justice in England" gives an excellent account of the evolution of these systems.

The "common law" is not an expression connoting some specific idea. But its origins are customs themselves. They evolve themselves into rules of conduct and process of their enforcement, in turn, creates legal rules. It connotes a whole complex judicial system evolved over the centuries in England and showing great penchant for migration to other parts of the globe. Initially, that term came to be used for the laws and customs applied by the royal courts which emerged after the Norman Conquest, and which progressively replaced local laws and customs applied in sundry local courts. As the decisions of these courts came to be recorded and published, so the practice developed whereby past decisions would be cited in argument before the court, and would be regarded as being of persuasive or even binding authority. The point that decisions of the superior courts are a source of law in their own right is the largest single distinctive feature of the common law system, as distinguished from the continental, "civil law" systems based in origin upon Roman law but later on a series of codes established in the nineteenth and twentieth centuries. Many other countries are now the inheritors of the Common Law System and 'are not only proud of their inheritance but even glory in their preference'. There are

school men who would still openly thank God that the law of England was not a science! "Common law" broadly denotes rules derived from decisions of the superior courts in contrast to those derived from statute.

Lawson says:

"western law is usually divided into two great systems, known respectively as the civil law and common law, the former of which consists of a large number of national or local laws each of which has as its core a civil code based largely on Roman Law. The latter consists of other national or local laws the common feature of which is a central body of doctrine which is not contained in a code but is continually being distilled from the decisions in an immense number of cases decided by the courts of law, at first exclusively in England, but later in England and in other parts of the Commonwealth and the United States of America."¹⁰

The two groups have different traditional techniques which make 'it difficult for a lawyer brought up exclusively under a common law system to read a law book dealing with a civil law system and vice versa: it is like learning a new language only distantly related to one's own.' It should be a consolation to 'English lawyers to know that even the very general knowledge of 'Roman law that almost all English lawyers acquire at an early stage in their legal education gives them a distinct advantage over lawyers brought up only in the civil law'

Sir Fredrick Pollock, Professor of Jurisprudence at Oxford University, delivering his inaugural lecture on "English Opportunities in Historical and Comparative Jurisprudence" pointed out that the "English laws grew in rugged exclusiveness, disdaining fellowship with the more polished learning of the civilians." There are certain further points of distinction of the two systems. Structurally and organizationally the higher courts in Civil Law countries are basically different from those in the Common Law countries. Supreme Court of United States and the Supreme Court of Canada have nine-judge courts; Civil Law countries for instance the French System there is a dichotomy of higher courts at the top – one for the ordinary civil and criminal appeals, called Cour de Cassation, and another for administrative matters – Conseil D'Etat. In each of these higher courts there are great number of judges said to be over 100 in either of the two courts. In Germany the number of judges attached to the Supreme Court for Civil and Criminal matters is said to be over one hundred. In Italy it is close to three hundred.¹¹ A higher court in Civil Law system is usually divided into a number of divisions. There is, therefore, no impress of the personality of the judge in the decision making or in the judicial law making. The higher courts in Civil Law countries decide a large number of cases which may have no bearing on the evolution or development of the law. In 1975 French Cour de Cassation decided 6525 civil and 3611 criminal cases. Comparison in the House of Lords is that 49 civil and criminal decision made in 1976 by the House of Lords and less than 200 yearly decisions in Civil, Criminal and Constitutional matters rendered by the US Supreme Court.

In the continent the Judges are "Career judges" who enter the judiciary at a very early age and are 'promoted' to the higher courts largely on the basis of technical merits and seniority. Their professional training trends to develop skills in 'merely interpretative' rather than policy oriented decision making. In the higher courts in the Common Law countries "judicial nominations imply to a very large extent the political choice of an emerging personality."

Today public law and Constitutional litigation and the powers of judicial review constitute a system of public law which invokes the best of both traditions. Constitutional adjudications indeed have a predominant legislative element. So far as resolution of disputes between citizens is concerned what is needed is better recruitment, training and sharpening the judicial skills and better and more scientific docket management. It also calls for more imaginative deployments of other alternative dispute resolution techniques such as arbitration, mediation, conciliation etc. In the area of criminal litigation there must be imaginative decriminalization and procedures for summary disposals of minor cases in this area. Just administration of justice must, I perceive, be more participatory. Experienced members of the bar be invited to be part-time magistrates disposing off less serious criminal cases.

Migration of Common Law into India

English would 'carry with them not only the Laws but sovereignty of their own state; and those who live amongst them and become members of their community become also part-takers of and subject to the same laws'.

This statement of the Privy Council ¹² would be appropriate if the English settlements in India had been in a "uninhabited or barbarous country". But the few foreigners had come to make a settlement for purposes of trade into what the 'Privy Council recognized 'a very populous and civilized country'. At the time the English traders came into India, there was no territorial conquest and no question of a conqueror's law being imposed in a 'uncivilized or barbarous' country. On the contrary it was India's civilization and its property that attracted the English.

The introduction, though in stages and by different means, of the English Common Law is described by Setalvad as the "fascinating story of what Sir Fredrick Pollock has called the expansion of the common law in India". This change, if one may say so without an element of a hyperbole, profoundly influenced the course of the political and cultural history of the Indian sub-continent. The significance of this exposure of India to western legal systems is not grasped in its plenitude owing to the fact that though it had stunning consequences on India's history, culture and future its advent happened with an un-stunning pace.

The East India Company had its first charter in 1600 from Queen Elizabeth I. English law began to be administered through its application to the British subjects in the small pockets of East India Company. The Royal charter of 1609 gave power to the East India Company "to make reasonable laws, Constitutions, orders, ordinances as to them seem necessary , not repugnant to the Laws, Statutes and Customs of "our realm". In 1618 Sir Thomas Roe, Ambassador of James I, obtained from the Moghuls the power and authority of deciding disputes between the

English in their factory at Surat. In the fascinating account of the "British Justice in India" Fawcett refers to the 1661 Charter of Charles II, which empowered the East India Company "to judge all persons that live under them in all cases, whether civil or criminal, according to the laws of this kingdom and to execute judgement accordingly." About that time the Portuguese ceded the Island of Bombay to English which in turn leased it to the East India Company in 1688 at a quit rent of ten pounds a year. In 1726 the Crown granted Letters Patent establishing Mayor's Court in Presidency Towns. Of these development Setalvad in his Hamlyn Lectures says:

"Rules for the civil government and equal distribution of justice upon the island were drafted in England by the Company's law officers and, after the approval by the Solicitor General, a draft was settled and engrossed to be sent out to India in 1669. These laws were divided into six main sections which included a section entitled "Establishing a Method for Due Proceedings". This section provided for the establishment of a court of judicature for the decision of all suits and criminal matters under a judge to be appointed by the Governor and Council, and for all trials in the court to be by a jury of twelve Englishmen, except when any party to the dispute was not English, in which case the jury was to be half English and half non-English. It also made provision for regularly sittings of the court, the recording of its proceedings in registers, the

fixing of reasonable court fees and for a right of appeal from the court of judicature to the Governor"¹³

The year 1726 is reckoned as the year of the official and formal entry of English Law into India. The influence of English Law spread and concerted "efforts to keep the courts in the straight and narrow path of English Law" were manifest. The case of collector of Masulipatnam Vs Cavalry Venkata Naranapah (8 M.L.A.500) was an instance in point where the court instead of applying principles of personal law that governed the Hindu dying without leaving heirs, applied the English Law of escheat. Of this process of migration and expansion of the Common Law, Sir Fredrick Pollock says :

"In British India the general principles of our law, by a process which we may summarily describe as judicial application confirmed and extended by legislation, have in the course of this century, but much more rapidly within the last generation, covered the whole field of criminal law, civil wrongs, contract, evidence, procedure in the higher if not in the lower courts, and a good deal of the law of property...It is not too much to say that a modified English Law is thus becoming the general law of British India"

Setalvad says that the work of the Law Commissions of the nineteenth century injected English Common and Statute Law and equitable principles into the expanding structure of Indian jurisprudence. On the quality of those

codes and the equitable principles Sir Fredrick Pollock observes:

"The Indian Penal Code which is English criminal law simplified and set in order , has worked for more than a generation, among people of every degree of civilization, with but little occasion for amendment. In matters of business and commerce English law has not only established itself but has been ratified by deliberate legislation, subject to the reform of some few anomalies which we might well have reformed at home even now, and to the abrogation of some few rules that had ceased to be of much importance at home and were deemed unsuitable for Indian conditions. More than this, principles of equitable jurisprudence which we seldom have occasion to remember in modern English practice have been success-fully revived in Indian jurisdictions."¹⁴

Future of Common Law in India

Justice Benjamin Cordozo was in the Supreme Court of the United States for about six years. There were judges who were there for over three and a half decades. Why is Justice Cordozo rated amongst the great judges in the jurisprudence of the English speaking world? One of the reasons is his great faith in the potential of the common law to adapt itself and meet the challenges of the growing times and the changing needs of the society.

Lord Denning in the English Courts used the process of development of common law to great effect. The tort of spoilt holiday for example was one of his innovations. Then again, a three hundred year old English Common Law rule that, in law, a husband is incapable of the offence of rape on a wife during the subsistence of marriage was changed in the very case to which the changed rule was applied. A distant analogy in India was how a judge in a High Court had declared a provision in the marriage laws for restitution of conjugal rights violative of personal freedom and privacy under Article 21 of the Constitution. But that view was short lived. Great judges who have developed common law have displayed a perceptive sense of legal history and responded to the felt needs of times.

In the fast changing world one of the powerful judicial tools to update the law for social regulation of the fallout of the new Biology, could well be the common law. We already hear of the possibility of a synthesized virus, which means life can be created in a laboratory. The implications of this are immense. There are already re-definitions of motherhood, legitimacy, parenthood in the laws regulating Surrogacy arrangements and Fertilization and Embryology.

Einstein summed up the discovery of atomic energy with his characteristic simplicity: He said and went on to predict "We shall require a substantially new manner of thinking if mankind is to survive." Similarly, law needs new manner of thinking for its continued usefulness. Webster said justice is the greatest concern of humans on earth. It will be imperiled if law does not keep pace with changing-times.

Chapter III

CHAPTER NOTES

1. Evolution of Ancient Indian Law : Nares Chandra Sen-Gupta: 1950, page 37.
2. Evolution of Ancient Indian Law : Nares Chandra Sen-Gupta: Page 40.
3. Evolution of Ancient Indian Law : Nares Chandra Sen-Gupta: page 41.
4. Evolution of Ancient Indian Law : Nares Chandra Sen-Gupta: page 43.
5. F.H.Lawson; "The Rationale Strength of English Law"
6. William Holdsworth: "Some makers of English Law": page 1
7. Quoted in "Barbarism to Verdict" Justin Fleming, page 6.
8. William Holdsworth: "Makers of English Law"; page 128.
9. William Holdsworth "Makers of English Law"; page 128-129.
10. Lawson: "Rational Strength of English Law"
11. Cappelletti's "Judicial Process in the Comparative Perspective" p. 49 F.N. 133.
12. Advocate General of Bengal vs. Ranees Surnomaye Dossee, 1863, 9 MIA 424
13. "Rise of Common Law" – Hamlyn Lecture series: "Common Law in India" ; pages 6-7.
14. Hamlyn Lecture Series, "The Common Law in India" page 30.

Lecture IV

STATE AND THE CITIZEN – “DIGNITY OF THE INDIVIDUAL AND THE UNITY AND INTEGRITY OF THE NATION”

The preamble of the Indian Constitution assuring the “dignity of the individual and unity and integrity of the nation” imply individual freedom and a Government by law. They are the foundations of civilized living. Both these are the gains of the historic and hard fought battles against authoritarian tyranny. History of liberty is the history of procedures by which it is protected. The evolution of a system of protection of the dignity of the individual against the whim and caprice of authority has been amongst the most significant achievements of the judges. The balance between the liberty and dignity of the individual and the security of the nation is a delicate one.

Personal Liberty

To Blackstone¹ personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place which one's own inclination may direct, without imprisonment or restraints unless by due process of law. Dicey², described this right as understood in English Law as a right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification. In England, traditionally, this liberty is an immunity. Personal liberty, in English law, is to do whatever that is not proscribed by law. The concept is remedy-oriented. It flows from the Magna Carta.

Fourteenth amendment to the United states Constitution prohibits the deprivation of life, liberty or property of a person without the "due process of law". "Due Process" is truly an amorphous concept not capable of precise definition. However the import of it is explained as "the process of law which hears before it condemns, which proceeds upon enquiry and renders judgment only after trial. Its meaning is that every citizen shall hold his life, liberty and property and immunities under the protection of the general rules which govern the society. The operation of the rule is both in the substantive as well as procedural areas.³

Willis in his treatise says 'while Supreme Court still refuses to define the phrase "due process" yet whatever it means at the present time is what the Supreme Court says it means'. 'The most important use to which the united States Supreme Court has put the due process clause is to enable it to declare unconstitutional any acts of legislation which it thinks unreasonable.'⁴

In A.K. Gopalan vs The State of Madras the interpretation of Article 21 of the Constitution of India which appealed to Justice Fazl Ali who was in the minority was that any interpretation that would deny the sweep of 'due process' to Article 21 would result in the most important fundamental right to life and personal liberty being left at the mercy of legislative majority. The majority, however, was persuaded to view that in matter of protection of liberty the Constitution preferred the supremacy of the legislature to that of the judiciary and that the liberty is to be 'a liberty confined and controlled by law'. This positivist interpretation of the words "according to the procedure established by law" virtually resulted in that

clause meaning "procedure prescribed by the legislature". One of the judges even gave an extreme example to illustrate the supremacy of the legislative prescription: that if the cook of the Bishop of Rochester is bidden to be cooked in oil, even that law would not violate Article 21 ! But this is all in the past. Maneka Gandhi's case has disapproved this positivist interpretation. The law that the legislature can make under Article 21 must satisfy other objective tests of justness, reasonableness and fairness.

Now under the activist interpretation of the 'life and liberty' clause a large number of social issues have been brought-up under the concept of 'Right to life'. Life, not mere animal existence but a life with dignity, right to livelihood, right to privacy, right to fair and speedy trial and right to a life-sustaining environment, right to humane treatment in custody, right against torture; right to medical treatment in emergencies, right to education, standards in women's care homes, in children's care homes, right to shelter, right against illegal and arbitrary searches, have all been recognized with various emphasis under Article 21 of the Constitution.

In the constituent assembly when the language of Article 21 was debated. Dr. Ambedkar asked the assembly to examine the implications of the nebulous concept of the "due process" which would place in the hands of the federal judiciary an enormous power of declaring a law made by the elected representatives of the people invalid on grounds which appeal to the mood of the judges for the time being. He argued:

"We are, therefore, placed in between two difficult positions. One is to give the judiciary

the authority to sit in judgment over the will of the legislature and to question the law made by the legislature on the ground that it is not good law, in consonance with fundamental principles. Is that a desirable principle? The second position is that the legislature ought to be trusted not to make bad laws. It is very difficult to come to any definite conclusion. There are dangers on both sides. For myself, I cannot altogether omit the possibility of a legislature packed by partymen making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of the individual. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court examining laws made by the legislature, and by the dint of their own individual conscience or their bias or prejudice, be trusted to determine which law is good and which law is bad. It is rather a case when a man has to sail between Charybdis and Scilla and I, therefore would not say anything. I would leave it to the House to determine in any way it likes."⁵

The judicial contribution to the protection of personal liberty is perhaps the most impressive chapter in the working of democratic societies in the second half of the last century. There is criticism of the judicial role from some quarters – that judiciary is casting itself in an elitist mould and trenching under the guise of

interpretation upon areas which is that of the legislature. When judges do not find their brand of economic or social philosophies reflected in the law, they yield to the temptation of pouring new meanings unto old words to accord with their own sense of justice. Freedom with its correlative of negative duties on the part of the state, critics say, has been interpreted to mean 'Rights' with correlative of positive duties on the State quite often involving diversion of financial allocations. In the Indian context, the criticism is that too much is poured into Article 21. When judges find no way of accommodating their own theories of justice, Article 21 has come in handy as a convenient 'hold-all' to accommodate their views. They urge that a liberty is converted into a positive right. This criticism has the familiar ring of Robert Bork's "Tempting of America". These controversies, are in apparent garb of difference of interpretation, conceal more fundamental conflict of economic philosophies and in the view of the role of the modern state.

It is true that expressions 'life and liberty' in Article 21 has received the most expansive interpretation. It has even encompassed the obligations of the State to build roads for communication in the sparsely populated hill regions. An amazing array of human needs are brought under Article 21.

An interpretation that a reasonable means of social security, a right to the barest necessities of life without which life cannot go on, right to potable water, a certain minimal standards of health, housing and environment to avoid conditions of wretchedness, some economic security to prevent humiliating denial of self-respect and human dignity are increasingly recognised as part of human rights. To identify the proper limits and to strike the right

balances calls for judicial genius. Health, Education, security are global public goods. They are not the social rewards of economic reforms but really are economic gains of social reform. They are not rewards of development but essential to the very process of development.

Liberty versus Security

The history of the law on the powers of the police to arrest, detain and interrogate a person suspected of crime in 'England is not particularly distinguished'. Sir William Holdsworth⁶ refers to the administration of criminal Justice before and after the Norman conquest as including a process of decision of the guilt or innocence of person by trial by ordeal — and appeal to the supernatural. In one of them, the person had to carry a hot iron in his hand for nine steps and if on the third day the hand blistered he was held guilty. There were other ordeals by water, by morsel and later by duel. When the ordeals were given up, there were no adequate alternatives. Lord MacDermott traces the history of torture as an aid to proof as a fall out of the inquisitorial system. Referring to the inquisitorial and accusatorial systems lord MacDermott says:

".....There are good features in both these procedures, but the inquisitorial system which spread widely over the continent of Europe, gained such efficacy as it had at a high price. It brought the court into the arena and away from an attitude of aloof impartiality; it tended to identify the court and the prosecution so as to enhance the powers of the latter; and

it encouraged the use of torture as an aid to proof. The accusatory process is less likely to develop these defects, but its adoption in England was in the beginning, a haphazard affair and largely due to the emergence of a new form of trial rather than to any deliberate effort to steer clear of the perils of a judicial inquisition....."⁷

But resort to torture was not altogether eliminated. Lord MacDermott observes:

"The accusatory trial, however, did not necessarily preclude a resort to judicial torture as part of the process of investigation. It certainly seems to have reduced the danger of this, but in an age which, by our standards, was not easily moved by human suffering and in which the stability of the State constantly called for stern measures we cannot say that trial by jury and its procedural consequence made torture, the worst abuse of the power to prosecute, impossible or even unlikely...."⁸

The aphorism that an "Englishman's home is Englishman's castle" and the right "to be let-alone" said to be the most comprehensive and most valued by civilized man symbolizes the concern of the law for upholding the dignity of the individual. As to the influence of violations of law charged by those charged with its enforcement, Justice Brandeis said:

".....Our government is the potent, the omni-present teacher. For good or for ill,

it teaches the whole people by its example. Crime is contagious. If a government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself, it invites anarchy. To declare that in the administration of the criminal law the end justified the means.....would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face".⁹

The quality of a nation's civilization" it is said "can be largely measured by the methods it uses in the enforcement of criminal law.

There is pervasive existence of uncivilized methods of interrogation. Protection from such degrading procedures, which violate human rights , is the concern of Article 19(1)(d), Article 20(3) and 22 (1) of the Constitution and sever~~al~~ non-derogable obligations of the State under several important international human rights conventions. It is sometimes claimed that the police have a legal power at common law t detain a suspect for questioning. At the common law no officer has had any special power to do what would otherwise be a battery. In England, the police powers of Arrest, Detention and Interrogation have been streamlined by the Police and Criminal Evidence Act 1984 based on the report of the Sir Cyril Phillips Committee.¹⁰

In *Collins V Willox Goff*, L.J explained the law on the powers of the police to 'stop and question' a citizen:

".....But a police officer has his rights as a policeman. A police officer may wish to engage a man's attention, for example if

he wishes to question him. If he lays his hands on the man's shoulder for the purpose he commits no wrong. He may even do so more than once; for he is under a duty to prevent and investigate crime, and so his seeking further, in the exercise of that duty, to engage a man's attention in order to speak to him, may in the circumstances, be regarded as acceptable; see *Donnelly v. Jackman* (1970) 1 WLR 562. But if, in taking into account the nature of his duty, his use of physical contact in the face of non-cooperation persists beyond generally acceptable standards of conduct, his action will become unlawful; and if a police officer restrains a man, for example by gripping his arm or his shoulder, then his action will also be unlawful, unless he is lawfully exercising his powers of arrest....."¹¹

Lord Denning writes: "when a police constable says to a man 'come along with me. I am taking you to the station, that is an arrest. No matter if the man goes quietly or resists with all his strength, it is an arrest."¹²

The report of the Royal Commission is indeed, very instructive. In regard to the power of Arrest, the report recommended that the power to arrest without warrant must be limited by the object to be served by the arrest, namely, to prevent the suspect from destroying evidence or interfering with witnesses or warning accomplices who have not yet been arrested or where there is a good reason to suspect the repetition of the offence.

Then there is the right to have someone informed.

That right of the arrested person, upon request, to have someone informed and to consult privately with a lawyer was recognized by section 56(1) of the Police and Criminal Evidence Act 1984 in England. That section mandates that a person has been arrested and is being held in premises, he shall be entitled, if he so requests, to have one friend or relative or other person who is known to him or who is likely to take an interest in his welfare informed of the arrest. These rights are inherent in Article 21 and 22(1) of the Constitution and require to be recognized and scrupulously protected. An entry shall be required to be made in the Station Diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly.

Admissibility of Evidence Collected When the Procedure is Held to Be Illegal :

Evidence is often collected illegally by searches, surveillance both physical and electronic, wire-tapings and by physical and assaults. In the State of Maharashtra v. Natwarlal Damodardas Soni¹³ it was held that the admissibility of evidence as to the seized articles was not affected by the illegality, if any, in the search and seizure. It was, however, indicated that the court may be inclined to examine the evidence secured by such seizure more carefully. There was earlier divergence of views in the High Courts. In R.M. Malkani v State of Maharashtra¹⁴ in proof of a charge of bribery, a tape recorded conversation between the accused – person and the person from whom a bribe was demanded was sought to be produced. The court rejected the contention of the accused that he could not be convicted on such illegally obtained

evidence. Supreme Court in *Puran Mul vs Director of Inspection*¹⁵ held that there was no constitutional or statutory bar in using such evidence.

The issue involves a choice of policy options and a balancing of the interests of the society by the punishment of crime on the one hand and the promotion of civil liberties on the other. In *Elias v Pasmore Horridge J.* held:

".....the interests of the State must excuse the seizure of documents, which seizure would otherwise in fact that such documents were evidence of a crime committed by anyone..."

This view was criticized by Lord Denning in *Ghani v. Jones*. Lord MacDermott in *Murphy*'s case justified the view in favour of admissibility and referred to the appellant as a 'serious security risk'. "This was revealed by the trick of misrepresentation practiced by the police.....and no other way of obtaining this revelation has been demonstrated or suggested." Lord Denning echoed the same sentiments when he commented on the law as it then stood :

"no magistrate has the power to issue a search warrant for murder.....the police have to get the consent of the house holder to enter if they can ; or if nor; to do it by stealth or by force... somehow they seem to manage. No decent person refused them permission. If he does, he is probably implicated in some way or the other. So the police risk an action for trespass. It is not much risk."

Adrian A.S.Zuckerman suggested :

"The tension between strict observance of constitutional rights and the protection from

crime is ever present and there are only two alternative approaches for reaching a compromise. One is to sweep manifestations of police transgression under the carpet..."

..... the trouble with this method is that in the long run it is likely to cast doubt on the impartiality of the judiciary. If a compromise has to be found it is better to do so in a publicly accountable fashion rather than by wink and nod. The other alternative is, therefore, to develop a suitable constitutional theory for underpinning the justice. This is the course taken by most Anglo-American systems and sooner or later English law will have to follow."¹⁶

The larger question is whether judicial approach to the great issues of liberty and of the right balance between public interest on the one hand and individual liberty on the other, should be idealistic or pragmatic?

Writ of Habeas Corpus : Key to Unlocking the Door to Freedom :

Today superior courts in India not only examine the legality of any detention but award compensation for wrongful detention also. Traditionally the jurisdiction of Habeas Corpus –described as Key that unlocks the door to freedom – was consummated the moment the person detained was set at liberty. The Regulating Act 1773 gave to the Supreme Court at Fort William the jurisdiction of the King's bench under the common law. An interesting account of the history of this writ is given by Stetavald in his Hamlyn Lectures.

In the matter of Ameer Khan¹⁷ the question was whether the writ of Habeas Corpus could issue outside the Presidency Town. Justice Norman of the Calcutta High Court held that though the power under the code exercisable was within the Presidency Town; (but extended only to the British subject in the jurisdiction in the mofussel), the court had inherited that power of the King's Bench under the Charter and that power could not be whittled down by Statute. The code of 1898 enacting section 491, expressly empowered only these High Court at Calcutta, Bombay and Madras to issue the writ; but within the Presidency Towns. The matter did not rest there. Libertarian Lawyers campaigned that a statute could not take away the court's power under the charters which, they said, had inducted the great common law remedy of Habeas Corpus. Accordingly, a Full Bench of the Madras high Court consisting of Chief Justice Schwartz, Justice Oilfield and Justice Couttstrotten declared :

"The law can be stated to be that in every part of the British Empire every person has as right to be protected from illegal imprisonment by the issue of the prerogative writ of habeas corpus. The King's Bench in England exercised the power of issuing such writs throughout the British Empire until the statute known as the Habeas Corpus Act (25 and 26 vict. C 20) was passed. By that Act the power of the King's Bench are limited to England and such places outside England which have no local court competent to exercise the power. It follows that these petitioners must have a right to such a writ, and it is a matter of absolute right either from a court in this

country, if there be one competent to grant it, or from the Court of King's Bench sitting in London"

However the controversy was set to rest by the Amendment of 1923 recognising the liberal position. Today the writ of Habeas Corpus symbolises the universal judicial technique for the protection of the liberties of free people. The procedure for the enforcement of this right to the remedy are equally sacrosanct. The right to this remedy itself is a fundamental right in India.

National Security and Individual Liberty

This debate is acquiring an increasingly louder tone in the context of pervasive use of violent means to achieve political objectives. Technology which was used increasingly as a means of achieving economic prosperity and concentration of wealth by a monopoly of intellectual resources, to the detriment of the poorer countries, has ironically become the tool of undoing their happiness. Those who are denied this prosperity use this technology for destructive purposes. In recent decades the world has seen destruction on such massive scale that all the values of civilised living seem to be in danger of effacement. Human Security is at great risk by sudden eruption of violence and conflagrations.

Human Security Issues

Paradigms of development, economics, criticality of demographic pressures, the inequities of international economic order, concerns for human survival, respect for human rights, environment, the problems of social exclusion, and pluralism converged to create this important discourse on "Human Security". The impact of this discourse has made

many shifts of emphasis in international obligations. Focus has shifted from 'State Security' to Human Security.

In a dissertation of the Human Security programme of the Harvard School of Public Health (Sept 2000) on "Human Security Crisis and Transition", there is a neat treatment of this subject. As in all theoretical encapsulations of the interaction of socio-economic factors, the threshold issues are, generally, the problems of definition and measurement and formatting a frame-work. While an over-inclusive definition puts the subject out of focus, an under-inclusive definition denudes the subject of the critical aspects. The current level of international interest in this discourse reflects the gravity of the problem of human insecurity. Referring to the history of the concept of Human Security, the Harvard paper mentions that "Human Security emerged in the 1990s as a conceptual response to two changing dimensions of the international order, referred to as globalisation and the end of the Cold War which paradoxically increased the risk of international conflict and shifted the locus of insecurity from the nation state and its allies to the individual and community. The following working definition was proposed:

"Human Security as an underlying condition for sustainable human development. It results from the social, psychological, economic and political aspects of human life that in times of acute crisis or chronic deprivation protect then survival of individuals, support individual and group capacities to attain minimally adequate standards of living, and promote constructive group attachment and continuity through time. Its key measurable components can be summarised as ; a sustainable sense

of home; constructive social and family networks ; and an acceptance of the past and a positive grasp of the future. It is suggested that these components can be best measured by trends in their inverse indicators (social dislocation, shifts in horizontal inequality, and discount rate) according to metrics and units that will require further specification."

The credit to bringing into sharp focus the new dimensions of Human Security as a collective expression of the concerns of human rights, Rule of Law, basic decencies of civilised living, pluralism, food security and a whole host of those values that make life on the planet bearable and meaningful must go to UNDP Human Development Report 1994.

The report detached and liberated the concept of "Security" from its earlier narrow connotation as security of territory from external aggression and attached it to the 'legitimate concerns of ordinary people who sought security in their daily lives' The report said:

"For many of them security symbolized protection from the threat of disease, hunger, political repression and environmental hazards. With the dark shadows of the cold war receding, one can now see that many conflicts are within nations rather than between nations. For most people a feeling of insecurity arises more from worries about daily life than from the dread of a cataclysmic world event. Will they and their families have enough to eat ? will they lose their jobs? Will their streets and neighbourhoods be safe from crime? Will they be tortured by a repressive state? Will they

become a victim of violence because of their gender? Will their religion or ethnic origin target them for persecution?"

The publication of the Canadian Government 1999 "Human Security" Safety for people in changing world" furnishes a further meaningful definition of Human Security:

"In essence Human Security means safety for people from both violent and non-violent threats. It is a condition or state of being characterized by freedom from pervasive threats to peoples rights, their safety, or even their lives... from a foreign policy perspective, human security is perhaps best understood as a shift in perspective or orientation . It is an alternative way of seeing the world, taking people as its point of reference rather than focussing exclusively on the security of territory or governments. Like other security aspects- is about protection – Human Security entails taking preventive measures to reduce vulnerability and minimize risk, and taking remedial action where prevention fails."

The human security brings together the psychological and social factors in the study of human behaviour in its responses to situations of psycho-social insecurity. The psycho-social demands pertain to a sustainable sense of human safety, a sense of community, constructive social support and a sense of better future. "Children need caring adults; terrified refugees need to be able to feel safe; people from diverse cultures seek respectful space for religious practice; women in camps should not be forced into prostitution."

The UN Secretary General's Millenium Report refers to aspects which contribute to and enhance this discourse of human security. The Secretary General tells that " there is much to be grateful for. Most people today can expect to live longer than their parents, let alone their more remote ancestors. They are better nourished, enjoy better health, are better educated , and on the whole face more favourable economic prospects. There are also many things to deplore, and to correct. The century just ended was disfigured, time and again, by ruthless conflict. Grinding poverty and striking inequality persist within and among countries even amidst unprecedented wealth. Diseases, old and new, threaten to undo painstaking progress. Nature's life-sustaining services, on which our species depends for its survival, are being seriously disrupted and degraded by our own everyday activities."

Miscarriages of Justices and Their Remedies

A state when fear stalks its security and threats of disruption of its tranquility loom large displays panic reactions. Even in normal times the pressure of performance puts the police and security forces under stress. Miscarriages of justice is the result. Many innocent persons and their helpless families become victims. Such miscarriages cannot be wholly eliminated. But some examples have shown how civilised responses have enabled reasonably acceptable mechanisms for relief in cases of such miscarriages of justice.

In the United Kingdom, in recent times, there was a spate of what was generally perceived as wrong convictions procured by the Police by suppression of truth, even manipulation of scientific evidence and by over-zealous neglect of prosecutorial obligations of fair disclosure. The instances popularly known as "Guild Four", "Maquire Seven" 'Birminham Six' tossed up issues over which there was great expression

of public resentment. The result was the setting up of the new body called 'The Criminal Cases Review Commission' which has power to refer cases to the court if they thought there was a real possibility that any conviction in any criminal case was such as could not be upheld. A large number of cases have since come before the Commission.

The courts upon reference treat the matter as appeal and have corrected miscarriage of justice. Yet any final definition of miscarriage of justice is difficult to arrive at. But Justice Bingham commends the one offered by Sir John May in his Report on his review of some sensational cases in England.

"Thus I suggest that a miscarriage of justice occurs when the result of criminal proceedings is one which might not have been reached had a specific failing in the criminal justice system not occurred in connection with or in the course of those proceedings. Such a failing may be one of procedure, it may be a breach by the investigating police officer of the rules of proper practice, it may be an error on the part of the trial judge or the Court of Appeal, it may be that a witness or witnesses perjured themselves, it may arise because a witness who could give relevant evidence could not be found or refused to testify, or through the passage of time has forgotten or has a muddled memory of that which he observed. It may be the result of incompetence on the part of the lawyers, or the inadequacy or inherent uncertainty of some of the rules of evidence. It may even be due to prejudice on the part of the jury"¹⁸

Convictions based on the so called 'confession' by the accused have caused some concern. Confessions are notoriously suspect. Sir James Stephen refers to an Indian Policeman's version: "it is much more agreeable to sit in the shade rubbing red pepper into the defendants eyes in order to make him confess the crime than go about in the hot sun looking for evidence against him that you cannot find and that may not even exist."¹⁹

Chapter IV

CHAPTER NOTES

1. Blackstone: "Commentaries on the Laws of England"
2. "Law of the Constitution".
3. Dardmouth College case.
4. Wills: constitutional law p 48
5. Constituent Assembly Debates Vol IX
6. "A History of English Law" 1977 Edn.... Vol 1
7. Hamlyn Lectures (ninth series) on "protection from power"
8. The power of prosecution, Protection from power – Lord MacDermott; p 16-17.
9. Olmstead v United States, 277 US 438 at 485.
10. Report of a Royal Commission on Criminal Procedure, – papers 8092, 1981.
11. 1984 1 W L R 1172 at 1178.
12. Due Process of Law, p 103.
13. AIR 1980 SC 593.
14. AIR 1973SC 157.
15. 1974 93 ITR 505
16. "Illegally-obtained Evidence – Discretion as a Guardian of Legitimacy (1987 – Current Legal Problems p 55)
17. (1870) 6 Bengal L R 392
18. Sir John May in the Final Report on the Guildford and Woowich bombings.
19. Justice and Injustice: Lord Bingham.

Lecture V

HUMAN RIGHTS

International Human Rights Regime

International Human Rights regime grew out of and acquired impetus from the horrors of World War II and the holocaust. 'Today, the human rights regime is an indelible part of our legal, political and moral landscape'. Just in two recent decades the ideology of Human Rights has brought about changes in the theory and practice of international law whose effects are yet to be fully absorbed. The doctrine of international accountability in human rights has two aspects. The first is the consequence and fall out of the series of changes that have occurred in the area international law and the rapidly changing status of the individual in international law. The second is the effect of these changes in the area of domestic law. The great concept of parliamentary supremacy in UK – though retained in form – in practical terms has undergone great change pursuant to the enactment of the Human Rights Act of 1998. So has the concept of domestic sovereignty. In international law the sovereign states were the subject of international law and its principal actors. International human rights regime has, on the contrary, projected on the centre-stage, the individual. This has profound consequences in international relationships.

In a span of just two decades – an insignificant part in a nation's history – what the European Convention on Human Rights has done to the doctrine of parliamentary supremacy in England is amazing. So are the developments

in the application and enforcement of international sanctions for human rights crimes, as the Pinochet Ugarte (case no 3) has shown. International criminal court has now come into existence and celebrated its first birth anniversary. This development is not without its deeper conceptual, practical, legal and jurisdictional controversies, too numerous and too imponderable to anticipate in advance.

Enforcement of Human Rights Through Bill of Rights

In U.K. freedom of the citizen stems from the concept that the citizen can exercise any right which is not expressly prohibited by law. Law identifies certain acts as deviant and prohibits them. The Human Rights law shifts the legal system 'from the traditional Diceyan model to a right based model'. Lord Bingham put it neatly in these words:

"Protection of Human Rights in this country has accordingly depended, to a very large extent, on Dicey's third source of protection, the ordinary law of the land. Because of the way in which the common law develops, the ordinary law of the land has not found a list of rights and freedoms which may not be infringed. Rather, it has proscribed certain forms of conduct as unlawful, leaving the citizen free to do anything which is not so proscribed. Thus the freedom of the citizen has essentially rested on the absence of legal prohibition, a form of negative right which Dicey believed to afford the best protection."

... For some time there was no significant pressure to incorporate the Convention into our law. But in time such pressure did grow.

The history of this debate has been very well described by Professor Michael Zander in his book '*A Bill of Rights*' (1997, ppl- 39) , and that history need not be repeated. While some prominent figures, notably Lord Scarman, Lord Wade and Lord Lester of Herne Hill, argued strongly and persistently for incorporation, governments of both colours were adamantly opposed. The turning point came in 1993 when the late Mr. John Smith, as leader of the Labour Party, observed in a lecture:

'The quickest and simplest way of achieving democratic and legal recognition of a substantial package of human rights would be by incorporating into British law the European Convention on Human Rights' (Zander 1997, p 33)

From then onwards the Labour Party espoused the cause of incorporation, although the Conservative government remained strongly opposed".¹

The idea of an entrenched, justiciable Bill of Rights operating as a limitation on the State Power produced mixed reaction in the Anglo-Saxon tradition. The proposed clause on 'life, liberty, property and due process of law' in the Irish Home Rule Bill, 1912, it is said, provoked Mr. Asquith to object to it on the ground that 'these expressions abounded in ambiguity and pitfalls and were provocative of every kind of frivolous litigation.' There was also criticism of the American experiment with the Bill of Rights that 'it did result in converting the Supreme Court of the United States into a 'Third House

of Legislature'. As the important role in enforcing Bill of Rights was that of the Judiciary, objections to a justicialbe, entrenched Bill of Rights was also rooted in democratic theory. The consequential shift of power towards the judiciary, and a corresponding shift away from the elected Legislature, was looked upon as undemocratic. It was argued that a Bill of Rights, and the judicial review of legislation it implied placed power in the hands of an 'unelected, unaccountable and elite group of people, namely, the Judges to overturn Acts of Parliament and placing such wide power to identify and determine the inconsistency between the impugned law or administrative policy on the one hand and the Bill of Rights on the other solely in the hands of the Judges, it was argued, would affect the three most fundamental elements of democracy, namely 'Participation, Representativeness and Accountability'. It would, it was urged, undermine the essential principle that those who exercise political power should be representative of the community they serve it and that judges exercise such power without being accountable to the community. Lord Denning held the strong view that if Judges were given power to overthrow laws made by Parliament, they would become political, their appointments would be based on political grounds and the reputation of the judiciary would suffer. Bill of Rights, he said, raises high expectations of people which in reality will not be able to be requited. He cited the Indian example. But Lord Scarman, however, was of the view that 'where times are normal and fear is not stalking the land, English law sturdily protects the freedom of the individual and respects human personality. But 'when times are abnormally alive with fear and prejudice the common law is at a disadvantage. It cannot resist the will, however frightened and prejudiced it may be, of Parliament'. He gave the classic illustration of the case of *Liversidge* case.

Lord Irvine of Lairg in an eminently readable article on 'The Development of Human Rights in Britain under an Incorporated Convention of Human Rights' uttered the following meaningful words :

"today we talk readily of Human Rights law: there is now a corpus of law, international and national, recognizing fundamental freedoms, International Human Rights law. Fifty years ago it would not have been possible to talk of such a body of law. Until then very few issues would have been regarded in any way as the province of international law. Piracy and slavery were the major exceptions. For many years the existence of internationally recognized norms of human rights was simply inconsistent with central propositions of international law, the positivist doctrines of state sovereignty and domestic jurisdiction."²

India is a confluence of many ancient philosophical, religious and cultural traditions and of myriad cultures. There is great variety and diversity of religion , language , faith, art, culture etc. But these myriad strands of diversity are woven into a rich and colourful purpose, emphasizing the essential oneness of all religious truths and the universality of mystic experience.

Philosophical Foundations of Human Rights Order

Referring to the philosophical foundations of Human Rights, Lord Lester said:

"For religious thinkers , human rights are considered to be fundamental because they are derived from divine revelation or natural

law. Secular thinkers treat basic civil and political rights as fundamental in the sense that they have a special claim to protection because they are rooted in democratic concepts of popular sovereignty, government by consent, and equal rights citizenship protected by law against what John Stuart Mill termed the tyranny of the majority".³

Lord Lester traced the fascinating evolution of fundamental human rights in England; how the common lawyers and judges aided the people and their elected representatives in their struggle against the divine rights of the kings. But when power was wrested from the Kings, Parliament, as the representatives of the people, became its sole repository. Parliament became supreme. Something had had to be done when Parliamentary supremacy tended to degenerate into 'elective despotism' as it was in the nature of every absolute power to run to excess. Lord Lester again says:

'the idea of 'fundamental rights' and of a fundamental constitutional law, taking precedence over ordinary laws, became eclipsed at the end of the seventeenth century by the concept of absolute Parliamentary sovereignty. In the earlier part of that century, the Judges had struggled not only for independence from the Executive but also for the right to withhold effect from laws that they regarded as unconscionable or contrary to a higher, fundamental and immutable natural law. The judges won the struggle for independence against the Crown's claim to rule by prerogative, but the price paid by the common lawyers

for their alliance with Parliament against the divine right of Kings was that the common law could be changed by Parliament as it pleased. The 'glorious bloodless' revolution was won by Parliament; although the Bill of Rights of 1688-89 and the Act of Settlement of 1700 recognized some important personal rights and liberties, the terms of the constitutional settlement were mainly concerned with the rights and liberties of Parliament itself. The alliance of Parliament and the common lawyers ensured that the supremacy of the law would mean the supremacy of the Parliament; or, more realistically, the supremacy of the central government in Parliament, Lord Hailsham of St. Marylebone's elective dictatorship⁴

The Vienna World Conference on Human Rights, 1993 reaffirmed that the Civil, political and the Economic, Social and Cultural Rights are 'universal, interdependent and indivisible'. "All Rights for All" was the exhortation. The European Convention on Human Rights and Fundamental Freedoms, 1950 (effective from 1953), the European Social Charter 1961 (revised charter 1996) and Protocols, the American Convention on Human Rights, 1969 (effective 1978), the African Charter of Human Rights and People's Rights 1981 (effective from 1986) and finally the Human Rights Act 1998 (U K) (which incorporates the provisions of the European Convention) and the South African Convention, 1996 deal with the Civil, Political and the Economic, Social and Cultural Rights cover the whole gamut of rights. There is, today, no theoretical division of rights as belonging to different generations. Ms. Klug in her recent work says :

"Human Rights are best understood as part of law, part of philosophy and part of political movement. The values which drive the idea of human rights owe almost as much to poetry and music as they do to legal principles. They owe nearly as much to the spirituality of all the great religions and to the eternal quest for righteousness as they do to revolutions and the demand for freedom from state tyranny. Human rights are values for a 'godless-age'.⁵

The "generation theory", according to her, is now replaced by the 'wave theory'.

".... the word wave is specifically adopted in the book to highlight the dynamic aspect of rights evolution. The idea of rights has changed over time because people have acted together to claim rights in different circumstances and with varying goals in mind. Implicit in the term "wave" is a recognition that there have been distinct periods when the idea of rights has come to prominence as a force to change. The analogy with the sea also suggests that the distinctions between the different waves are not rigid but ideas flow between them."

"In other words, in the history of the humans, "distinct periods" arrive when "new rights come into prominence as a force of change" That does not make Economic, Social and Cultural rights and other rights any the less important than Civil and Political Rights. Each 'wave'

is distinct, but merges and re-emerges concomitantly as time progresses."

In the diverse, conflicting and the apparently mutually irreconcilable demands of domestic sovereignty and of the rights of the individual against the State, the one common thread that runs through is the age-old and universal urge for the recognition of and appeal to a higher law to which all other laws must comport. The Human Rights and Rule of Law under a Constitutional Regime are the centripetal forces in plural societies. The Egalitarian philosophy holds that all men have certain minimal rights irrespective of their individual situational differences on the basis of race, caste, creed, language. The Egalitarian start from a 'base line of equal concern for the interest of everyone' According to Ronald Dwork in all human beings have a natural right to an equality of concern and respect, a right they possess not by virtue of or characteristic or merit or excellence, but simply as human beings with the capacity to make plans and give justice. This moral ideal is a reflection of a deep rooted moral sentiment that all human beings, great or small, virtuous or vicious, should be treated equal by virtue alone of the fact that they are born into the human family on the moral ideal of an impersonal love for mankind. Where one does not have this sentiment, where the pull of it is not felt at all, it is difficult to imagine how it can be shown by some kind of argument or by appeal to evidence that we ought to have that sentiment or the ideal that it gives rise to". 'As Nielsen posits: 'many things which we do are not required by any principle of rationality.'

"Men are Not Always Good": The Horrors of the World War II and the Holocuast :

On 10th December 1948, the United Nations General

Assembly at its third meeting at Paris adopted the Universal declaration of Human Rights. By a felicitous coincidence, precisely twenty years later on 10th December 1968, Professor Rene Cassin, the illustrious French, patriot and internationalist, was awarded the Nobel Prize for Peace for being its principal author. With incomparable understatement and irony, Cassin was then reported to have observed that the Universal Declaration was necessary because, as he said, "men are not always good". These haunting words could well serve as a fitting epitaph for the 20th century:

Consider the facts :

- Our century has, on its conscience, some 100 million human beings killed in armed conflicts and a further 12 million dead as a result to politically related violence, in which race, ethnicity, religion or political opinion has been a factor.
- Whereas, at the start of this century, only 5% of the casualties in situations of armed conflict were civilian, the century closes with 90% of such casualties being civilian.
- 50 million refugees and displaced persons today stand witness to the seemingly endless capacity of our species to inflict pain on its own kind.
- Our environment and eco-systems stand devastated and a hole in the ozone layer presages global disaster.

Consider, again, the facts :

According to the 1998 United Nations Human Development Report :

- of 4.4 billion people in developing countries, 3/5th live without basic sanitation, 1/3rd without safe drinking water, 1/4th without adequate housing, 1/5th do not study beyond grade 5, and 1/5th are severely undernourished.

- The same Report estimates that the additional cost for achieving and maintaining universal access to basic education for all, basic health care for all, reproductive health care for all women, adequate food for all, safe water and sanitation for all, is roughly Rs. 40 billion a year – less than 4% of the combined wealth of the 225 richest persons in the world – whose assets, let it be added equal those of 47% of the world's population (2.5 billion people)

The Universal Declaration

When the Third General Assembly of the United Nations passed the Universal Declaration of Human Rights on 10th December 1948, the concept was that all the rights were 'universal, interdependent and indivisible'. Thereafter, at the fifth session in of the United Nations 1949, the Commission on Human Rights proposed a draft Covenant on Civil and Political rights and while the complaint procedures in respect of these rights were being considered, there was delay. It was in the sixth session, the Commission decided to take up the Economic, Social and Cultural rights. In the meantime, the finalization of the draft of the Civil and Political rights went ahead though the UN General Assembly had passed a resolution on December 4th 1950, declaring that that the two sets of rights were 'interconnected and interdependent'. But the Commission unfortunately continued to treat the two sets of rights separately. The delay in the process led to the emergence of two separate covenants for each set of rights. The cleavage continued thereafter. The draft covenant for the Economic, Social and Cultural rights was finalized only in 1962. Of course, the General Assembly took up both covenants for finalization in 1966. It looked somewhat probable that the Western powers were more interested in giving priority

to the Civil and Political rights while the Socialist countries were emphasizing in the Economic, Social and Cultural rights.

The process of finalizing the covenants separately led to various distinctions between the two sets of rights. There came into being, rather unnecessarily, a concept of hierarchical system of rights. The Civil and Political rights such as liberty, freedom of expression etc. came to be called the 'first generation' rights as they were associated with the eighteenth century Declaration on the Rights of Man. The Economic, Social and Cultural Rights came to be called the 'second generation rights' deriving that description from the growth of socialist ideals in the nineteenth and early twentieth centuries and the rise of labour movement in Europe. Thereafter, the concept of a 'third generation' rights was introduced as referable to the rights of 'peoples or groups', such as the right to Self-Determination, Development and Environment.

Contribution of Indian Courts

The Civil and Political Rights as well as several Economic, Social and Cultural Rights found place in Part III of the Constitution as it was drafted in 1950. The broad division of Human Rights into 'Civil and Political' on the one hand and 'Economic, Social and Cultural' on the other hand emerged only in 1966. The Constitution of India, though it maintained in Art. 37 that the Directives Principles were not enforceable, included several Economic, Social and Cultural rights among the enforceable rights, in Part III.

Indeed, the UN Committee on Economic, Social and Cultural rights clearly stated that several rights which were included in the Covenant of Economic, Social and Cultural rights are capable of enforcement. The Committee pointed out that prohibition against discrimination between men and women (Art.3), equal pay for equal work (Art. 7 (a) (i), right

to form and join trade unions and right to strike (Art 8), rights of children for special protection (Art 13(2) (a), right to free, compulsory primary education (Art. 13(2)(a), liberty to choose non-public schools (Art. 13(3) and liberty to establish school are all enforceable rights.⁶ However, the UN Committee pointed out that the right to work (Art 6(1), Right to Health (Art 12 (1), food, clothing, housing (Art 11(1), and general education (Art. 12 (1), and general education (Art 13 (1) of the International Covenant of Economic, Social and Cultural Rights could be realized only by way of 'programmes for governmental policies in the economic, social and cultural field'.

Thus, Part III of the Indian Constitution, even in 1950, included not only fundamental liberties, which were Civil and Political rights but the various Economic, Social and Cultural rights. The right against discrimination, which is part of Art 2(1) of the ICCPR as well as Art (2(2) of the ICESCR was included in Art 14 of Part III, the prohibition against discrimination of women which is in Art 3 of ICCPR and Art 3 of ICESCR were included in Art 15 of Part III, the right to form trade unions referred to in Art 8 of ICESCR came to be included in Art 19(1)© of Part III; the prohibition against exploitation of children and the prohibition against forced labor in Art 10 (3) of the ICESCR was covered by Art 24 of Part III; the right to cultural life referred to in Art 15(1) of the ICESCR came to be broadly protected by Arts 25, 29 and 30 of Part III.

The relationship between the principles of international law , either customary or obligations arising out of bilateral or multilateral treaties , on the one hand the domestic law has been, and continues to be the subject of differing approaches. These distinctions have profound influence on

how use is made in domestic jurisdiction of international human rights law. Justice Micheal Kirby brought out this issue and its implications thus :

"Different theories about the relationship of domestic and international law compete for acceptance Monists assert that there is but one system of law, with international law as an element "alongside all the various branches of domestic law. For the monist, international law is simply part of the law of the land, together with the more familiar areas of national law. Dualists on the other hand assert that there are two essentially different legal systems. They exist "side by side within different spheres of action – the international plane and the domestic plane.

A culture of monism or dualism is inherited from our place of birth or adoption. I was raised in the dualist school. Whilst international law was a subject taught at university, and was regarded as true law, it was on a different plane. It addressed itself to States and international organisations and their concerns. Rarely did it impinge upon domestic law, doubtless because of the dualist theory and the discouraging attitude of the legal profession. The negative response was nurtured in the soil of dualism."⁷

Influence of Human Rights on the Development of Common Law and Constitutional Adjudication :

In 1992 Sir John Laws in a writing far ahead of its

times advocated what might in a broad sense be an argument for judicial incorporation of Treaty Rights.

".....to what extent can, and should the common law courts themselves elaborate and make good basic rights by building on existing public law principles, so as to insist upon and secure a high degree of priority for those central rights which broadly find their place in the principal substantive provisions of ECHR ? My thesis is that such an enterprise, ought to be and can be undertaken without any heterodoxy, and that it is supported by these four propositions., three of which , at least, are self evident; (1) none of the objections to statutory incorporation of ECIR rest on the proposition by peoples of the united Kingdom; (2) in the community of developed democracies, we have reached the stage where it can be said that rights of this kind of have become an axiom, or series of axioms, about those desirability there can be no serious argument. (3) it had generally been the task of the judges to ascertain the principles according to which the people are to be protected from the exercise of arbitrary power and (4) these norms or axioms ought to be developed by the distinct process of the common law"⁸

But over the years there has been afoot a process of inevitable influence of the two systems - the Human Rights Law on the one hand and the domestic law on the other. When the two great and powerful streams of thought flow

side by side there is an evitable intermingling of their waters. The richer stream is drawn upon by the other and we see this happen in the interaction between the Human Rights Law the common law. There is this inevitable cross fertilization. The very existence of a higher standard of human protection and a corresponding higher standard of State obligation in human rights law and its apparent absence in the domestic jurisdiction has troubled the courts. Lord Irvine illustrates this point.

The areas where the Universal Rights have a meaning are the very areas of concern of the Common Law. Mrs. Eleanor Roosevelt said :

“where after all, do universal rights begin? In small places close to homes, so close and so small that they cannot be seen on any map of the world. Yet they are the world of individual person; the neighbourhood he lives in ; the school or village he attends; the factory, farm or office where he works. Such are the places where every man, woman or child seeks equal justice, equal opportunity, equal dignity, without discrimination. Unless these rights have meaning there, they have little meaning elsewhere”⁹

Justice Kirby also argued forcefully :

“Each modern judge and lawyer has a duty to contribute to this process. It is the way of the future. That is why it is unsurprising that the influence of the *Bangalore Principles* through out the world continues to gather pace. The achievements of the first decade will seem insignificant when the second decade closes.”¹⁰

The purpose of the law making power, it is said, is to make law an instrument to make life a better and fuller...., 'Law is an instrument of a fuller life, better and completer life; that is the purpose of law making power'. The influence on Common Law started with small beginnings with the acknowledgement that these treaty obligations serve as aids to construction. Where Statutes admits of two interpretations, one consistent with the Human Rights Regime is preferred by the Courts and the Courts presume that the law making authority did not intend to legislate in violation of the treaty obligations. This is not to say that treaty obligation *proprio-vigore* are part of the domestic law. There are several instances in English Law where as Lord Irving of Lairg points out the European Community Law has influenced the domestic law in a significant way. Lord Chancellor mentions the case of the solicitors liability to the disappointed beneficiary for the failure to draw up a will before the demise of the would be testator. He also refers to Woolrich Equitable Building Soceity vs IRC¹¹

The principles adumbrated in international conventions of Human rights have progressively been used by the Indian judges either as aids to statutory construction or for expansion of the content of existing rights. Justices Bhagawati, Krishna Iyer, Verma, Kuldeep Singh, Jeevan Reddy, Anand and several other judges of the High Courts have pioneered ways of introducing the philosophy of human rights into domestic jurisdictions. Judges have viewed that the fact that the International Covenants have not been legislatively incorporated into the domestic law does not detract from the significance to be attached to their ratification by the state. Judges have endeavoured, so far as it is possible and to the extent uninhibited by any domestic law, to interpret domestic law in a manner which comports with the treaty obligations of the

International Human Rights regime. Justice Krishna Iyer while recognising that from the point of view of domestic jurisdiction 'national rules alone count', however, held that "with regard to interpretation, however, it is a principle generally recognised in national legal systems that, in the event of doubt, the national rule is to be interpreted in accordance with the State's international obligations." This was in a case which examined the liability to arrest of a decretal-debtor¹².

In the standards of human decency in the treatment of persons in custody the Supreme Court of India invoked Article 5 of the Universal Declaration and exhorted that 'even while discussing the relevant statutory provisions and constitutional requirements, court and counsel must never forget the core principle found in Article 5 of the Universal Declaration of Human Rights 1948'¹³

Supreme Court, invoking Article 10 of the ICCPR observed :

"The State shall take steps to keep up to the Standard Minimum Rules for Treatment of Prisoners recommended by the United Nations, especially those relating to work and wages, treatment with dignity, community contract and correctional strategies. In this latter aspect, the observations we have made of holistic development of personality shall be kept in view"¹⁴

In another leading case the Supreme Court said :

"In recent years this position has been well realised. In 1959 the declaration of all the rights of the child was adopted by the General Assembly of the United Nations and in Article 24 of the International Covenant on Civil and Political Rights, 1996, the importance of the

child has been appropriately recognised. India as a party to these International Charters having ratified the Declarations, it is an obligation of the Government of India as also the State machinery to implement the same in the proper way".¹⁵

The Supreme Court observed:

"It is now an accepted rule of judicial construction that regard must be had to international conventions norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law."¹⁶

Again the Court held :

"For the present, it would suffice to state that the provisions of the covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution , can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such. So far as multilateral treaties are concerned, the law is, of course, different – and definite."¹⁷.

More recently, the court surmounted even a specific reservation made by the Indian State to derogate from the obligation under the ICCPR to compensate victims of unlawful arrest which was otherwise not an absolute but derogable by express reservation. In a significant statement the Court said :

"Article 9(5) of the International Covenants on Civil and Political Rights 1966 (ICCPR)

provides that 'anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation'. Of course, the Government of India at the time of its ratification of (of ICCPR) in 1979... made a specific reservation to the effect that the Indian legal system doesnot recognise a right to compensation for victims of unlawful arrest or detention, and thus did not become a party to the Covenant. *That reservation, however, has now lost its relevance in view of the law laid down by this Court in a number of cases awarding compensation for the infringement of the fundamental right to life of a citizen*¹⁸.

This area of domestic application bristles with many ticklish aspects of the permissible extent of domestic use of the norms of International Human Rights law. A recent Australian case is *Queen Vs Swaffield* (1998) 151 ALR 98...

"Today we talk readily of Human Rights law. There is now a corpus of law, international and national, recognizing fundamental freedoms, International Human Rights law. Until then very few issues would have been regarded in any way as the province of international law. Piracy and slavery were the major exceptions. For many years the existence of internationally recognized norms of human rights was simply inconsistent with central propositions of international law, the positivist doctrines of state sovereignty and domestic jurisdiction."¹⁹

The inter-face between International Human Rights Regime and the orthodox doctrine of domestic sovereignty tossed-up some critical issues of great significance to the future of the world. The treaty of West Phalia ended the thirty years war. The human Rights Regime interrogates many of these entrenched conception of domestic sovereign. The most critical of which classical notion that sovereign state is immune from outside interference for its internal actions. The challenges are of immense contemporary relevance to the many nations and events across the globe. The influence of the International Human Rights order on State's sovereignty, Parliamentary supremacy and generally as limitations on Government, are fascinating developments of the second half of the last century. Speaking of these changes Antonio Cassese said :

"To be sure, they have not changed the actual structure of that community or the main rules of the game. Sovereignty States have remained the true holders of power; Nevertheless, the two doctrines (Human Rights and self-determination of people introduced seeds of subversion into this framework, destined sooner or later to undermine and over a very broad space of time, the course of which cannot yet be foreseen – to revlutionalise those structures and institutions"

Walker and Mendlovitz made some profoundly relevant observations .

"No longer, it is said, can State pretend to be autonomous or to exercise a monopoly on the legitimate use of violence in the specific

territory. The most important forces that affect people's lives are global in scale and consequence. Even the most powerful States recognize serious global constraints on their capacity to affirm their own national interest above all else."

Michael Reisman said :

"Although the venerable term 'sovereignty' continues to be used in international legal practice is quite different. International Law still protects sovereignty, but not surprisingly – it is the people's sovereignty rather than the sovereign's sovereignty"²⁰

This was the great change; the beginning of the Universality principle. The Universal Declaration of Human rights in 1948 and the two important Covenants of 1966 sought to place - those great rights of man above the law and as value - judgements and the ethical touch stone for the moral content of domestic laws. The contribution of the Judges in the development of this idea has been profound and remarkable. The profound transformation brought in by Human Rights Act 1998 in U K are summarized by lord Lester :

"the general principle of United Kingdom is that 'a treaty is not part of (domestic) law unless and until it has been incorporated into the law by legislation'. Prior to the coming into force of the human rights act 1998, the European Convention on Human Rights, although an international treaty which binds the United Kingdom (and obliges the united Kingdom as a matter of international obli-

gation to amend our laws and procedures where they are found to have breached the Convention,) therefore has a limited, albeit important, effect in domestic law in creating rights and duties."

A learned author says "The State as a sovereign entity is not going to disappear anytime soon. However it will be only one part of a number of kinds that partially and multiply severing organization. It will not be the only entity which can lay claim to authority over its citizens". Thus, as we come to recognize that we are living in what Rosenau calls, an era of 'post-international politics'²¹. We also realize that we are not as Francis Fukuyama has posited, 'at the end of history' where one form of economic, social and governmental form has triumphed over all others and what remains to be worked are minor details. (Francis Fukuyama, "The End of History?", *The National Interest* 16, Summer 1989, p 3-18) Rather we are likely in for a long period of time where issues regarding the loci of power and authority will be up in the air and not amenable to any final solution or formulation and will be under constant questioning and challenge by various sectors, particularly as the issue of human rights continues to be an arena of contestation. We are entering what might be called the Age of Ambiguity, where our post modern, postindustrial viewpoints lead us to the conclusion that our social relations today and into the future will be characterized by a discomfoting – yet full of potential – ambiguity."

Extent of Human Deprivation in India

Pillip Alston speaking of "indivisability" of Human Rights and the Vienna slogan "All Rights for All" said that there

is more invisibility than indivisibility. Over the years under the sweep of the global winds of change transforming a welfare-economy into a market economy, the State has itself undergone a change in its character and in its mechanisms for the realization of its social and economic goals. The Overview of the World Development Report 2000 mentions that

“the development landscape is being transformed, presenting policymakers with new challenges at the global and local levels”. The Report recalls four critical lessons which 50 years of development – experience have yielded. “First, macro-economic stability is an essential prerequisite for achieving the growth needed for development. Second, growth does not trickle down, development must address human needs directly. Third, no one policy will trigger development, a comprehensive approach is needed. Fourth, institutions matter; sustained development, should be rooted in processes that are socially inclusive and responsive to changing circumstances”.

The lesson is that public goods, education, health etc., are not the rewards of development but are essential for the process of development itself. Mere ruthless, rootless voiceless, jobless, future less growth does not mean development. It can mean only a grotesque growth. Market economy has its own negative impact on equality of distribution. It can produce unacceptable levels of economic inequality. In the USA (1994) the poorest 20% of the population had 1.5% of the share of income and consumption while the richest 20% had 45.2%. In China (1995), the poorest 20% had 5.5%

share and the richest 20% 47.5% . This reflects the anomalies and inequities inherent in the system. Over the 30 years from 1960 to 1990, the affluent 20% of the world have enhanced thier share of Incomes and consumption from 70.1% to 86% while the poorest have had their share reduced to 1%. The Human Development Report 1999 noted these increasing inequalities between the countries. It says :

"Inequality between countries has also increased. The income gap between the fifth of the world's people living in the richest countries and the fifth in the poorest was 74 to 1 in 1997, up from 60 to 1 in 1990 and 30 in 1960."

By the late 1990s the fifth of the world's people living in the highest-income countries that :

- 86% of world's GDP- the bottom fifth just 1%
- 82% of the world's export markets- the bottom fifth just 1%
- 68% of foreign direct investment- the bottom fifth just 1%
- 74% of world telephone lines, today's basic means of communication – the bottom fifth just 1.5%

As a result of these inequalities, there has not been a perceptible and significant improvement in the quality of people's lives. For instance, there has been a marked slowing down in the rate of reductions in infant mortality in recent years. Again, despite the better growth record in recent years, the gender gap between women and men has hardly been bridged. India's low- level of human development reflects the persistence of extensive human deprivations. Despite the growth record, India's back log of human poverty is indeed

enormous. At the end of 50 years, human poverty still persists in substantial number.

In India there are 390 million children below the age of 14 who need education, health-care, nutrition etc., 670 million of Indian do not have basic sanitary facilities. Nearly 280 million do not have access to potable water. Maternal anemia and low birth weight related problems are serious limitations on social development. Efficiency in governance and strong stable governments are particularly critical during the transition into a market economy. Nicholas Stern, of the World Bank said : "The terrorist attacks on the United States on Sept 11 were one aspect of globalization. Rapid growth and poverty reduction in China, India and other countries that were poor 20 years ago is another. The development of the internet and easier communication and transportation around the world is a third. The spread of AIDS is part of globalization, as is the accelerated development of life-extending technologies." However, the third world sentiments against globalization are building because of their disadvantages in a global market. Out of the 3,37,000 patents granted in 1998, 91% went to the OECD countries with a global population of just 19%. Out of 70 billion dollars spent on Health Research in 1998, less than 1/2% went towards the problems of the tropics. Out of 1223 new drugs introduced during 1975-1996 only 13 were relevant to the problems of the under- developed countries. According to a Human Development Report the GDP in the Russian Federation fell by 41 percent from 1991 to 1997. The life expectancy of the Russian male dropped four full years to 58. The report blames the transition to capitalism and affects of globalization. But the real problem is that the vast majority in the third world see market economy as an elite private club and not as a means of achievement of common goal.

Human Deprivation in India :

- India ranks 128 on the Human Development index- only 45 countries in the world have a lower human development index.
- Life expectancy at birth is estimated to be 63 years up by 32 years from the life expectancy in 1950-51. But it is 17 years less than Japan, 10 years less than Srilanka and 7 years less than China.
- In 1911 life expectancy in India was 20 years. In 2000 it was 80 years for urban women in Kerala but wide variations exist in life expectancy between male and female; between the States and between the rural and urban areas.
- 260 million people in India live below the income poverty line.
- Close to 380 million people are illiterate and nearly 2/3rd of them are women.
- 52% married women in the reproduction age group suffer from anemia – the proportion varies from 23% in Kerala to 86% in Arunachal Pradesh.
- Nearly 1,10,000 women die during childbirth or due to pregnancy related causes – most of them can be avoided.
- Infant mortality rate have almost halved to 72 births per 1000 births down from 146 in 1951 but India had the slowest rate improvement in child survival in South Asia.
- Wide variations in infant mortality rate exist across the States-it varies from 16 in Kerala to 98 (more than 6 times higher) in Madhya Pradesh and Orissa.
- One third of all babies in India have low birth-weight; in Sub-Saharan Africa, the proportion is just one-sixth.
- 53% children under 5 years remain malnourished. Percentage of malnourished children is nearly twice the percentage reported in many parts of Sub-Saharan Africa.

Human Rights : Are Champions More Important Than the Rights?

The tone of the international discourse on Human Rights is attaining an increasingly shriller pitch. The approaches of the rich of the world to the Human Rights issues and Human security are becoming more contentious, adversarial and censorial instead of being consensual, co-operative and constructive. The developing world is left to wonder whether the champions are more influential than rights themselves as, increasingly, human rights issues are selectively brought –up against the developing countries to justify economic discriminations. The hope is that the rich of the world realise, that time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital 'should be capable of wider application than the mischief which gave it birth'. The poor of the world should not be left to ask in wonderment : who is using human rights for what!

I might recall some beautiful words of Emeritus Professor of Yale University referring to the preamble of the American Constitution: he said:

"I have always been haunted both troubled and nourished in spirit- by certain words near the close of the Preamble of our Constitution – "and our Posterity" — These words start up the music of human time – the music of hope. IT is in that time – in its fleetingness and in its infinity - that our Constitution has its ordainment and establishment."

".....Webster said that justice is the great interest of humans on earth. Our posterity will need to live – I hope they will know that

they need to live – in what they can feel to be a just society. We are denied that blessing; may our posterity be blessed therein beyond us."

We shall all join him in this hope.

1. Lord Bingham of Cornhill : "The Way We Live Now: Human Rights in the New Millennium", The Earl Grey Memorial Lecture : 1998.
2. Based on Tom Sargant Memorial Lecture : 1998 Public Law (Summer) p 221.
3. Lord Lester : Introduction : "Human Rights : Law and Practice" Butterworths 1999.
4. Ibid : Introduction.
5. Ms. Franscisa Klug "Story of U.K> Bill of Rights: Values for a Godless Age" 2000, p 18 Quoted in Public Law 2001 (summer) p 436.
6. See : Henry J Steiner and Phillip Alslon, "International Human Rights in Context : 1999, p 277;
7. See : The Road From Bangalore, First Ten Years of the Bangalore Principles on, the Domestic Application of International human Rights Norms; Justice Michael Kirby AC CMG.
8. See "Is the High Court the Guardian of Fundamental Constitutional Rights? " Commonwealth Law Bulletin Vol 18, Nov, 4, 1992).
9. See Human Rights Quarterly 1000 p 766.
10. See : The Road From Bangalore, First Ten Years of the Bangalore Principles on the Domestic Application of International human Rights Norms; Justice Michael Kirby AC CMG.

11. See : Woolwich Equitable Building Society v IRC (1993) A.C. 70, 177);
12. See: Jolly George Verghese vs.Bank of Cochin :AIR 1980 SC 470.
13. Prem Shankar Shukla vs.Delhi Administration AIR 1980 SC 1535.
14. See Sunil Batra vsDelhi Administration AI R 1980, SC 1579.
15. Sheela Barse vs, Secretary, Children Aid Society AIR 1997, SC 656.
16. Vishaka Vs State of Rajasthan AIR 1997 SC 3011.
17. See POCL vs Union of India 1997(3) SCC 433.
18. D.K.Basu vs State of West Bengal 1997, 1 SCC 416.
19. The Development of Human Rights in Britain. page 221.
20. American journal of International Law "Sovereignty and Human Rights in Contemporary International LAW.
21. James N Rosenau Global; Changes and theoretical Challenges : toward a post-international politics for the 1990s.

Lecture VI

RULE OF LAW AND CONSTITUTIONALISM

Rule of Law

Herbert Spencer said : The great political superstition of the past was the divine right of Kings. The great superstition of the present in the divine right of the Parliament.¹

The ancient Indian theory of State envisaged a pre-state society where every individual acted according to the Rules of public and private behaviour and lived in a state of mutual protection; but, as time passed, powerful individuals began to cast eyes on the property of the timid and the weak. The institutions of kingship was therefore created. The king had to enforce the law, protect the innocent and chastise the offenders. The legal discipline of regulating the rights and obligations of citizens inter-se, and the State and the citizen was binding on both the Ruler and the Ruled.

In his eminently readable Howard Memorial Lecture 2002, Lord Justice Laws spoke of the great Greek tradition : "there is a common perception that whereas the Romans bequeathed a majestic inheritance of law, roads, and imperial administration, the Greeks merely gave us epic, tragedy, comedy, architecture, sculpture, painting, democracy, philosophy, political science and the beginnings of the physical sciences. This superficial judgement is very unfair to the Greeks."² I will refer to the story Justice Laws tells at the end.

The concept of Rule of Law is the outcome of the hard fought legal and political struggle in the common law traditions of England. It is the culmination of a long and bitter struggle

of the common lawyers against royal tyranny. As far back as in the thirteenth century, Bracton maintained that even Kings were subject to law. He exhorted, "King shall not be subject to man, but to God and the Law, since Law makes the King". Law would, then, bind both the King and his subjects. James I, who believed in the divine right of Kings, declared that the King's will was supreme. He told the judges not to interfere with his prerogative courts, such as the Star Chamber. Chief Justice Sir Edward Coke repudiated the King's claim and declared that judges would follow the common law and the King was under the law. Indeed, the judges won the struggle against the Royal claim to rule by prerogative. The Parliament, with the aid of common lawyers, won the 'glorious bloodless' revolution against the Kings. But, in the place of the King's supremacy, the supremacy of the Parliament came to be established. The supremacy of law which Bracton and Coke had fought for and won came to mean the supremacy of Parliament and its penchant for "elective dictatorship". Men realized that it would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values. In Common Law the liberties of the subject were mere implications of two fundamental postulates. The first was that a British subject may say or do as he pleased, provided, he did not violate any substantive law or impinge on the rights of others. It was said in a lighter vein that the right to swing one's own arm could only be up to the nose of the next man. The second postulate was that public authorities have only such powers as were expressly authorised by common law or the statutes. Every action of public authority should disclose a "legal pedigree". As supremacy of Parliament did not necessarily mean legitimacy, need arose to find out ways of protection from power of the Parliament itself.

Parliamentary supremacy could be checked only by the doctrine of Government of enumerated powers under a written constitution and by making some rights, such as the right to life, to liberty, to reputation, beyond the reach of Parliament. From time immemorial, the presence for an immutable higher law acting as limitation on all sources of temporal power was recognized as Natural Law. But its practical derivative was the Bill of Rights which withdrew the Rights to Life and Liberty from the vicissitudes of political controversies and placed them beyond the reach of the majorities. They depend on the outcome of no elections nor the Parliament exercising its legislative power could alter them. The principal concern of rule of law was to limit and discipline public power.

The doctrine of Rule of Law is that laws ought to be equal, general and known. It shall be administered by independent judges. The three organs of state shall be separate. Rule of Law envisages the pervasiveness of spirit of law throughout the whole range of Government. It gives expression to something, which is otherwise inexplicable. It is the 'met-wand' for harmonizing individual liberty and public order. Rule of Law is the operating instrument of justice in a civilised society. Indeed, the historical foundations of Rule of Law go back to the Greeks and the Romans. Their concept of natural law recognised a as test of legality of the laws 'right reason in agreement with nature'.

Our constitution rests on federalism, democracy, constitutionalism, rule of law and respect for minority rights. "These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other." Democracy as a fundamental value in our own constitutional and political culture is an essential interpretive consideration. A sovereign people exercises this right to self-

government through the democratic process. A functioning democracy requires a continuous process of discussion. 'The amount of time that people are willing to waste in hearing each other talk' said Sir Oliver Franks, "is a very important constituent of our public-life."

There are three essential components of this concept of Rule of Law. The first is that the law is supreme over the acts of both Government and private persons. There is one law for all. The second is that the rule of law requires for its operation the making of just laws which embody and give expression to the more general and somewhat amorphous normative principles of Rule of Law. "Rights and duties, after all, may exist on paper, but those who are unimpressed by pieces of paper may still have a healthy respect for threats of imprisonment. An independent judiciary, and a judiciary with the power to issue practical orders was more important than any number of grand theoretical declarations about Rights of Man."

But often enough there are no satisfactory answers as to how rule of law is enforced. The courts, in the ultimate analysis, 'do not have either the power of the sword not the power of the purse'. Many a time in American constitutional history, the wielders of power, Jefferson, Lincoln, Roosevelt, Nixon questioned the judicial authority and were disinclined to accept the wisdom or the authority of the courts. As an American Constitutional lawyer observed, "Constitutionalism works, our liberties are protected, and our society is free because the weak depend upon the Rule of Law and Rule of Law depends on voluntary compliance. When the test comes, that realisation must be strong enough for the people to rise up, morally and politically, and overwhelm the offender. The roots of constitutionalism lies in the heart of the people."³

The third is that the exercise of public power must find its ultimate source in some legal rule and the relationship between the State and the individual must be regulated only by law. This third principle is the bond that unites the governors and the governed. If this obligation of the government is broken, then it would be unrealistic to expect a voluntary, unilateral adherence to law by the citizenry. Government is a potent teacher; it teaches people by its own example. If government is seen as a habitual violator of law, it is nothing short of an open invitation to anarchy. No self-governing people can for long be held down by any government which itself is seen to be a violator.

The case book tells us that in *Entic's case* where the court declared that in the absence of a statute, or judicial precedent, one could not interfere with the liberty of the individual. The court rejected the argument of the 'State necessity' holding that 'common law does not understand that kind of reasoning.'

But in times of war a sense of fear that stalks the nation has a strange influence on one's sense of liberty. In *Liversidge vs. Anderson* the House of Lords placed a mistaken spirit of national security over the values of individual liberty. But then *Liversidge* was an aberration. The shattering dissent of Lord Atkin resounds through history. He said :

"I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive-minded than the executive. In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has been one

of the pillars of freedom, one of the principles of liberty for which on recent authority we are fighting, that the judges are no respecters of person, and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified by law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I':

"I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister..."

After all this long discussion the question is whether the words 'If a man has' can mean 'If a man thinks he has'. I am of opinion that they cannot, and that the case should be decided accordingly."

I may recall the tribute, richly deserved, by Sir John Laws to Lord Atkin :³

'Thirty eight years later, in the Rosminster case, Lord Diplock and Lord Scarman acknowledged in terms that Lord Atkin had been right, and the majority wrong. But at the time Lord Atkin was badly treated for his outspokenness, being effectively sent to Covenry. He died a little over two years later, in 1944. With deference to many other wise and brilliant men, I think he was perhaps the greatest common lawyer of the last century.

To compare his with Socrates is of course jejune and inept. But to compare Liversidge's case in 1942 with the Arginusae trial in 406 B C exposes a fragility of the rule of law, a fragility that beats the same weak drum as the centuries pass. The weakness is that disobedience to the law may seem to be justified by expediency, and the imperatives of democracy, the preservation of the State itself, may provide the greatest expediency.

Liversidge case cast its own shadow in Gopalan's case. The words "accordance with procedure established by law" in Article 21 of the Constitution according to the courts positivist interpreter really became "procedure prescribed by the legislature". It was in Maneka Gandhi case that the balance was restored. Rule of Law, therefore, requires that "everything that passes under the form of enactment" need necessarily be considered the law. If this were so the laws of attainder "would be laws of the land." Rule of law is not merely "bulwark against arbitrary executive action but also bulwark against arbitrary legislation".

The other area I would like to refer to is the manifestation of Rule of Law in practical state craft. This area of law has on it the imprint of the constitutional developments in England. From the doctrine of the Divine Right of the King to that of Supremacy of Parliament, to Rule of Law and the authority of the courts as the final interpreters of the law it is a fascinating account of the evolution of a 'Constitutional Monarchy' which may in itself, seem a puzzle for the uninitiated. In a refreshing analysis Sir Stephen Sedley says that 'because the British State, perhaps more than any other, is bound up in its long and potent history, it is in the name of the

Crown that all these functions continue to be performed.⁴ He says that 'both the Crown and the Constitution are palpable' and adds :

"It is our organic constitution which for almost four centuries has determined that the Crown may adjudicate only through its courts; for over three centuries that it may legislate only by advice and consent of Parliament; and almost three centuries that it may govern only through ministers"⁵

It was in the answer to the recent claim to sovereign immunity of the third limb of the Crown – its ministers – from the process of another limb – its courts – in the case of *M v. Home Office* that Nolan LJ adopted this formulation : "The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is."⁶

Is the State bound by its own laws - both in its sovereign and non-sovereign functions? It was not so bound was the result of application of a rule of construction of statutes in common law of England. The crown is not bound by Statute save by express provision or by necessary implication. This was the earlier view of the Indian courts.⁷ This issue came up again before a nine judge Bench of the Supreme Court⁸. There the Government of West Bengal with reference to its trading activity was held guilty of the omission to take out a licence under the Calcutta Municipal Act 1951. In the earlier case the Supreme Court, by a majority decision had held (per Sinha C.J)

" It is well established that the common law of England is that the King's prerogative is illustrated by the rule that the Sovereign is

not necessarily bound by a statutory law which binds the subject. This is further enforced by the rule that the King is not bound by a statute unless he is expressly named or unless he is bound by necessary implication or unless, the statute being for the public good, it would be absurd to exclude the King from it."

But Wanchoo J dissented. he said :

"To my mind inherent in the conception of the Rule of Law that the State, no less than its citizens and others, is bound by the laws of the land. When the King as the embodiment of all power – executive, legislature and judicial – has disappeared and in our republican constitution, sovereign power has been distributed and various organs created thereby it seems to me that there is neither justification nor necessity for continuing the rule of construction based on the royal prerogative.⁹

The nine judge bench over-ruled the earlier decision :

"We have no Crown : the archaic rule based on the prerogative and protection of the crown has no relevance to a democratic republic; it is inconsistent with the rule of law based on the doctrine of equality."

Executive Power : In America and India

In India under the Indian Constitution Executive Power of the Union is vested in the President and shall be exercisable by him either directly or through officers subordinate to him in accordance with the Constitution. In the draft Constitution

the provision that the executive power shall be subject to the constitution and the law. The words "and the law" were deleted in the final draft. In 1951 when the Uttar Pradesh Government undertook to operate transport service and later when the government of Punjab took over the work of publishing text books, the power of the governments to do so was questioned on the ground that these actions had no legislative authority to support them. The contention was reminiscent of the American experience.

Under Article 2 Section (1) of the US constitution vests the executive power in the President of the United States of America. The constitution does not expressly stipulate whether it should be exercised subject to and in accordance with law. The question accordingly, arose whether the President could claim inherent powers. The Supreme Court of the US held¹⁰ that the President had an inherent power of executive prerogative, though Justice McReynolds and Justice Brandice dissented. But in the later case¹¹ the US Supreme Court took a different view and laid down that there is no inherent power of the President and that executive power must be justified by some specific grant of power either directly under the Constitution or under the legislative enactments.

But in India the view taken as to executive power was different. The Allahabad High Court in the Full Bench decision in *Motilal vs Government of State of Uttar Pradesh* AIR 1951 Allahabad 257) rejected the contention. The Punjab case came directly before the Supreme Court by a petition under Article 32 of the Constitution. Justice B K Mukherjea said :

"The Indian constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the

Government have been sufficiently differentiated and consequently it can very well be said that our constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another....

....The executive government, however, can never go against the provisions of the constitution or of any law. This is clear from the provisions of Article 154 of the constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws¹².

The Supreme Court noticed that in a welfare State the activities that a State is called upon to undertake for the promotion of social and economic welfare of the community are such that its executive power must enable the State to fulfil its obligations. The Supreme Court consistent with the provision in Article 53 (3a) observed :

"...The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State."¹³

Article 154 is the provision analogous to Article 53 in relation to the States.

Discretion versus Fixed Rules

There has been strong debate inspired, perhaps, by the exhortation of the Franks Committee that, "The rule of law stands for the view that decisions should be made by the application of known principles of laws. In general such decisions will be predictable, and the citizen will know where he is". The view was that any government action should be on the basis of pre-determined rules. But then the complexity of the modern state requires discretionary powers. Discretion is not necessarily the anti-thesis of rule of law. Justice Mathew said, "If it is contrary to the Rule of Law that discretionary authority should be given to the government departments or public officers, then there is no rule in any modern state."

This debate as to the place of discretionary powers in the governance of modern state has had its theoretical aspects debated in the opinions of the Supreme Court of India¹⁴. The lofty declarations and exhortations in the constitutional document are not self-executing. They need the implementing mechanisms of ancillary laws. Quite often the ancillary laws are either inadequate or if adequate, inadequately implemented. It becomes a constitutional duty of the judiciary, to expound the constitutional intention and also to examine the ancillary laws for the potential for translating the constitutional promise into reality.

Rule of Law : As a Sense of Orderliness

Canadian Supreme Court in the Patriation Reference describing Rule of Law as a "highly textured expression importing many things some of which convey a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority and vouch safes to the citizens

a stable and predicable and orderly society in which to conduct their affairs – provides a shield for individuals from arbitrary State action.” The importance of the ancillary laws, values and systems is indicated by the following observation of the Canadian Supreme Court in the Quebec case:

“Rule of Law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. It was this second aspect of the Rule of Law that was primarily at issue in the Manitoba Language Rights Reference itself. Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.”

“The constitutionalism principles bears considerable similarity to the rule of law although they are identical. The essence of constitutionalism in Canada is embodied in s. 52 (1) of the Constitution Act 1982, which provides that “(t)he Constitution of Canada is, the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution.”

Lord Henkin presents some minimum ingredients of constitutionalism such as : government according to the constitution, separation of powers; popular sovereignty and democratic governance; constitutional review; an independent judiciary; controlling of police; civilian control of the military; individual rights; and provision for amendment.

It would be the task of the judiciary to examine the inadequacy and under-inclusiveness of the ancillary laws and nourish them by judicially declared composite elements. This is particularly relevant in translating the constitutional phrases of democracy and of free and fair elections into reality.

Robert Bork at the end of his book "Tempting of America" recalls Robert Bolt's play "A Man For All Seasons" in which the following dialogue between Thomas More, daughter Margaret and son-in-law, Roper, to arrest a man they regarded as evil. Margaret said, "Father, that man's bad." More replied, "there is no law against that". And Roper said "There is! God's Law". More then said: "Then God can arrest him. I know what's legal not what's right. And I'll stick to what's legal....I am not God. The currents and eddies of right and wrong , which you find such plain sailing, I cant navigate. I'm no voyager. But in the thickets of the law, oh, there I'm a forester". Roper would not be appeased and he leveled the charge that More would give even the Devil the benefit of law. More said, "yes". What would you do? Cut a great road through law to get after the Devil? Roper reported, "I'd cut down every law in England to do that ! this drew More to say, "Oh?....And when you hide, Roper, the laws from coast to coast – man's law, not God's – and if you cut them down.... D'you really think you could stand upright in the winds that would blow then? yes. I'd give the Devil the benefit of law, for my own safety's sake."

The ultimate in the concept of law is to give the devil the benefit of Rule of Law.

What can the citizen do? I will go back to the story Sir John.

Laws was telling. It is the story of Socrates :

"In 399 B C, at the age of 70, Socrates was put on trial on a charge of impiety. I give only the sparest outline of the tale, about which there are many controversies. The law of Athens gave no exhaustive definition of impiety, and so the accusers provided particulars, as we would call them. They were three fold : not recognising the city's gods; inventing new divine things; corrupting the young. There are all sorts of problems about the nature of the charge, but I am not concerned with those. (At the Old Bailey, it might have been said to be void for duplicity) Socrates was tried by a jury of 500 or so (there are difficulties on the evidence about the precise numbers). Socrates was convicted. The penalty for impiety was not fixed. It was, as we would say, in the discretion of the court. However at a second hearing, Socrates effectively declined to propose any real alternative to death penalty which the prosecution demanded. And so he was condemned to death. His execution was delayed by a month out of respect for a religious festival during which executions were forbidden. During this time, Socrates was

visited by his friend Crito, who tried persuade him to escape: which was real enough possibility. Socrates refused.

Socrates tell Crito as what answer he would give if the State and the laws confronted him and asked "Tell me, Socrates, what are you thinking about doing? Are you contemplating by this act (sc. Escape) that you're attempting anything other than the destruction of us, the laws, and the whole city insofar as you can? Or, do you think that the city can still exist and not be destroyed when the decisions handed down in the courts have no force but are left without authority by private citizens and are destroyed" .

This is the eternal argument whether the citizen can at all disobey his country's laws.

The message of Rule of Law is "Let no man be trusted with power but tie him down from making mischief by the chains of-Constitution".

Chapter Notes

1. Herbert Spencer : "Man versus the State.
2. "Howard Memorial Lecture 2002, Lord Justice Laws.
3. Archibold Cox; The Court and the Constitution.
4. "Crown In Its own Courts" Sir. Stephen Sedley "Golden Metwand and the Crooks Card".
5. The Golden Metwand and the Crooked Cord. Christopher Forsyth p 253.
6. The Golden Metwand and the Crooked Cord. Christopher Forsyth p 254.

7. See *Province of Bombay V Municipal Corporation of the City of Bombay*, AIR 1947 P.C. 34; and *Director Rationing and Distribution V Corporation of Calcutta* : AIR 1960 S.C. 1355).
8. *Superintendent and Legal Remembrencer Vs. Corporation of Calcutta* (AIR 1967 .C. 997).
9. *State of West Bengal v. Corporation of Calcutta* 1967 p 1002).
10. In *Myers vs. U S* (1926 272 US 52).
11. *Youngstown Sheet and Tube Company vs. Sawyer* US 579.
12. *Rai Sahib Ram and others vs. The State of Punjab* AIR 1955 (2) SCR 225.
13. *Rai Sahib Ram and others vs. The State of Punjab*.
14. *Jaysinghan vs Union of India*, 1967 AIR; *Indira Ghandi vs Raj Narayan* AIR 1975 SC per Mathew J.

Lecture VII

JUDICIAL REVIEW

The power to declare a constitutional amendment unconstitutional if it alters the basic structure of the constitution, propounded in the Keshavananda Case is the high water mark and the culmination of a process that started exactly two hundred years ago in the United States of America. When Chief Justice Marshall asserted in the Marbury the power case to declare a legislation void, President Jefferson likened the federal judiciary to "thieves by the night". The Supreme Court of India has also declared that its own power to review even constitutional amendments on the test of 'Basic Structure' theory is itself a part of that un-alterable basic structure.

Constitutional Foundations of Judicial Review

In a federal democratic polity where as in India, the powers of three branches of government as well as the distribution of powers between the Union and the States are determined under the fundamental law, there must inevitably be some final authority for judicial umpiring and to determine the extent of to make binding the extent of powers of each organ of the state and in the working the federal text. In the very nature of things that task could only be assigned to the judicial branch. However, the doctrine and system of checks and balances requires that if the judicial branch goes beyond the pale of its own powers and purposes, the corrective power must rest with the ultimate political sovereign. This is exercised by and through the amending process. In a

sense the power to nullify laws passed by the elected representatives of the people by an unelected, non-representative set of judges has its own anti-majoritarian implication. This plausible anti-majoritarian nature of judicial review is counter-balanced by judicial restraint whose chief proponent was Professor James Bradley Thayer. This philosophy of judicial restraint which was the hall-mark of judges like Holmes, Cordozo, Frankfurter, Brandeis and Black was echoed in the early decisions and famous dissents of the Supreme Court. To Chief justice Harlanstone the only check on the judges exercise of power was their own sense of self restraint. Who, then, prescribes the standards of self-restraint?

Chief justice Kania said in Gopalan's case (SC 27 (42) (AIR 1950)

"But it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of Justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too indefinite either for its own security or the protection of private right."

But a more expansive statement of the judicial review was expressed by chief justice Bhagawati :

"Judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its consistent power

can abrogate it or take it away. If the power of judicial review is abrogated or taken away the Constitution will cease to be what it is"¹

Justice Holmes said something different:

"I do not think the United States would come to an end if we lost our power to declare an act of the Congress void"².

American Due Process :

In distinct periods of American judicial history, the expression 'due process' acquired distinct connotations. The judges of Lochner era were all born before the industrial revolution. They had their own mind-set. It almost tended to make the Supreme Court of United States the third house of legislature. As Woodrow Wilson remarked the Supreme Court sits 'as a kind of Constitutional convention in continuous session' The dominance of the substantive 'Due Process' in American Constitutional litigation was particularly seen during the half century prior to the 'New Deal'. The test of goodness or badness of law, as distinct from constitutionality, takes the court to a determination between difficult and competing values. An attempt to reflect the contemporary values of the society where no standards for measurement are yet unavailable. Those who speak for judicial restraint say that judges have no stock of economic or social wisdom by which they can sit in judgment over the goodness or badness of laws. It must be decided, they say, by what appeals to the crowd.

The turning point was indeed the effect of the appalling human conditions of the Great Depression. A learned author gives a graphic picture of those conditions.

"In November 1929 the bubble burst. The collapse of stock market prices measured the collapse of the entire economic structure. In the summer of 1929 the Dow Jones average for industrial stocks had been 381017. In the summer of 1932 it was 41.22. Ninety percent of the value disappeared."

"The plight of the farmers was worse. Corn was sold for seven cents a bushel, sugar for three cents per pound. Twenty five percent of the land in Mississippi was sold at auction on the foreclosure of mortgages."

"The plight of industry was no better. In the three-year period of December 31, 1930 to December 31, 1933, the gross national product fell from 194.4 to 56. Bankruptcy liquidation and reorganization were a chief business in legal profession. The average wage of the factory workers was forty cents per hour. Factory payrolls were cut in half. One of every four men available for work was unemployed. There were no labour unions, no unemployment compensation, and no social security."

"In one group of labourers were found clergymen, engineers, a school principal and a bank president. For factory workers the depression meant unemployment, bread lines, and soup kitchens. Municipal bankruptcies were common. The young hit the road. One young hobo was Eric Severeid, a banker's son, whose face and voice would become familiar to

millions of CBS News programs. The estimates of the number of youths who lives as tramps ran up to two million."³

The judicial attitudes to the New Deal Legislations changed under circumstances which had their own dramatic overtones. That needed some one like President Roosevelt who gave a new promise of hope to the nation. He declared that "the only thing we have to fear is fear itself". The nation rallied behind him.

These economic events had their own influence on judicial attitudes. Some writers even called it the demise of the "Due Process"

In 1963, the US Supreme Court had occasion to acknowledge these changes in judicial attitudes towards legislation :

"The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases – that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely – has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for judgment of legislative bodies, who are elected to pass laws. As this court stated in a unanimous opinion in 1941, "we are not concerned ... with the wisdom, need, or appropriateness of the legislation. Legislative bodies have broad scope to experiment with economic problems, and this court does not sit to "subject the State to an intolerable supervision hostile to the a basic principles

of our Government and beyond the protection which the general clause of the Fourteenth Amendment was intended to secure. It is now settled that States "have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or some valid federal law."

In the face of our abandonment of the use of the "vague contours" of the Due Process Clause to nullify which a majority of the Court believed to be economically unwise, reliance on *Adams v. Tanner* is as mistaken as would be adherence to *Adkins v. Children's Hospital*, overruled by *West Coast Hotel Co. v. Parrish*, (1937).

"We refuse to sit as a "superlegislature to weigh the wisdom of legislation" and we emphatically refuse to go back to business and industrial conditions, because they may be unwise, improvident or out of harmony with a particular school of thought."⁴

The court recalled Justice Holmes' earlier objection to the intrusion by the judiciary into the realm of legislative value judgments. It was observed : 'This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis. Dissenting from the Court's invalidating a state statute which regulated the resale price of theatre and other tickets"

Justice Holmes had declared :

"I think the proper course is to recognize that

a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."

Judicial Activism

Judicial Review was not fully comprehended during the founding period and remains controversial in American politics. The U.S. Constitution, in Article III, vests the judicial power in the Supreme Court and in any lower courts that Congress may establish. Yet, neither the nature nor the scope of that power is defined. Instead, Chief Justice John Marshall in *Marbury v. Madison* established the power of judicial review – the power to strike down laws enacted by Congress or the states and to declare official government action unconstitutional...

"The history of the judiciary is replete with examples of judges' assertions of independence; the first decision that federal District Court Judge Murray Gurfein had to make upon ascending the bench, for example, was to deny the administration that had just appointed him its request for an injunction to suppress the publication of the Pentagon Papers. And Chief Justice Burger, also appointed by President Richard Nixon, wrote for a unanimous court in *United States v. Nixon*, denying the President's generalised claim to executive privilege as a

sheild against turning over the so called Watergate tapes”

“ Despite the fact that courts are not self-starters, the self imposed limitations on judicial review, and given the tradition of judicial independence, the judiciary has proven to be neither the least dangerous branch, as Alexander Hamilton envisioned, nor quiescent “under the chains of the Constitution”, as Thomas Jefferson hoped. Prior to the 1983 ruling in *Immigration and Nationalization Service v Chadha* – striking down a one-house veto provision for federal regulations, but therewith throwing into question the validity of over 200 other statutes with similar provisions – the Supreme Court had invalidated over 110 congressional statutes and 1050 state laws or municipal ordinances. The court also reversed its own prior decisions some 175 times. By comparison, Congress and the States passed constitutional amendments overturning Supreme Court decisions only four times in almost 200 years.

The supreme court and the judiciary loom large in American politics in part because, as Alexis de Tocqueville observed :” Scarcely any political question arises in the united states that is not resolved, sooner or later, into a judicial question. Justice Felix Frankfurter like wise commented “almost every question in the history of United States is ultimately shaped for adjudication by the Supreme Court. Justice ”

Jackson proclaimed more boldly : "This is government by lawsuit. These constitutional lawsuits are the stuff of power politics in America."⁵

New Right Jurists

There are those who view Judicial activism with alarm. Lord Devlin cautioned even against judicial law-making and against the great temptation to "cast the judiciary as an elite which will bypass the traffic laden ways of the democratic process. But it would only apparently be a bypass. In truth it would be a road that would never rejoin the high way but would lead inevitably, however long and winding the path, to the totalitarian State". Critics of judicial activism say that there is too much leaning on the side of social reform ahead of social consensus and that there is an erratic subjectivity of judgements, an analytical laxness, an intellectual incoherence and of 'imagining too much history'. Judicial Activism in America is criticized for its infidelity to the constitution. Critics are suspicious of the wares of social wisdom in the judicial store house. They caution judges against the appealing attractions of the political policies disguised as constitutional principles and of being perpetual sensors of legislation. They say that legislations from the bench, once acquired becomes addictive. Implicit in the judicial activism, they say is the denial that judges are bound by law. There is an ancient saying that it is the part of the good judge to extend his jurisdiction. One may not wonder whether judges have been practicing this virtue to excess. It is not only executive power which is open to abuse. The judicial power may be abused by judges. As Professor Wade noted, that it was not so long ago that a Cabinet Minister in the House of Commons accused a high court judge of being "trigger happy".

The American New Right jurists want to turn this legal clock back. Bernard Schwatz calls Edwin Meese's 'jurisprudence of original intention' both undesirable and unworkable and 'turns back the constitutional clock by two centuries and fossilizes our public law'. Schwatz seeks to answer them in the famous words of Judge Learned Hand : "These are false hopes, believe me, these are false hopes". But Schwartz admits that the 'original intention', like Hamlet's father, is a ghost that refuses to remain in repose.

Judicial Activism , The other view

Speaking of the Supreme Court of the United States it was said "As a guardian of the Constitution and the symbols and instruments of free government, the Supreme Court was destined for controversy. The exercise of judicial review inevitably proves problematic for, as Justice Jackson said, the judiciary "is an institution of distinctive characteristics which were intended to give independence and detachment, but which also tend to make it anti-democratic". There is no "evading the basic inconsistency between popular government and judicial supremacy." Nor is the court "saved from being oligarchic because it professes to act in the service of humane ends." Justice Frankfurter reminds us: "The powers exercised by this Court are inherently oligarchic". The power and prestige of the Court rests on a paradox. The power of judicial review is at once antidemocratic and counter majoritarian, yet that power, in Chief Justice Edward White's words "rest(s) solely upon the approval of a free people.

Judicial review cannot be reconciled with democratic governance. Nevertheless, the constitution does not prescribe a democracy pure and simple, but a republic – a mixed form of government – in which political power is diffused among institutions that remain dependent on and account-

able to the people in a variety of ways. In a system of free government, majorities are constantly in flux and constrained by constitutional checks and balances. So, as Madison argued "dependence on the people is....the primary control on the government". The judiciary fulfills an important albeit limited role as an auxiliary precaution against both the abuse of governmental power by a tyrannical minority and the excess of majoritarian democracy. Far from being antithetical, judicial review is essential to the promise and performance of free government. (Views from the Bench : page 4-5)

I would call attention to two passages in the writing of Court of Appeals judge in the US which provide the Raison D'etre for judicial activism.

"In describing the role of the federal judiciary in deciding constitutional issues, I ascribe no particular political or social philosophy to the word "activist". Justice Sutherland, a staunch conservative on the court, was no or less "activist" in striking down social legislation and upholding governmental regulation of First Amendment rights than Justice Black was in upholding social legislation and invalidating state regulation of First Amendment rights. The activism I refer to is measured not by the end result but by how and under what circumstances the result is achieved."

"once a constitutional deprivation has been shown, it becomes the duty of the court to render a decree which will as far as possible eliminate the effects of the past deprivations as well as bar like deprivations in the future.

Because of the complexity and nature of the constitutional rights and issues involved, the traditional forms of relief have proven totally inadequate.

The courts have been left with two alternatives. They could throw up their hands in frustration and claim that, although the litigants have established a violation of constitutional or statutory rights, the courts have no satisfactory relief to grant them. This would, in addition to constituting judicial abdication, make a mockery of the Bill of Rights. Or, they could utilize their equitable powers to pursue the only reasonable and constitutionally accepted alternative : fashioning relief to fit the necessities of the particular case."⁶

Prof Mc Whinney refers to the risk of confusing constitutionality with morality and legality with legitimacy. In a passage which conveys some difficult ideas the professor quoting justice Frankfurter's own opening words in his dissent in *West Virginia State Board of Education vs Barnette* (1943) 319 U.S.624. That case which dealt with the freedom of conscience said that despite his own religious background he would keep his personal predilections out of his judicial responsibilities. He said :

"One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our constitution."

"It can never be emphasised too much that one's own opinion about the wisdom or evil of law should be excluded altogether when one is doing one's duty on the bench."

A written constitution with a justiciable Bill of Rights seeks to place values of life, liberty, human decency, and basic human rights above the reach of the ordinary laws, because these great rights of mankind depend do not depend on the whims of an amoral majority or the out come of any elections. The nature of the protection that a minority needs in the changing political and economic situations depend on an interpretation the entrenched rights in the changing contexts and the changing patterns. This can be done by an activist court. Not by turning the constitutional clock back.

The Right Balance

A learned lawyer,⁷ quotes the strong words of Wallace Mendelson :

“How easy the job of the activist judges- new or old— who do not find out but only make the law. No great effort, intelligence or integrity is required to read one’s merely personal preferences into the constitution – a great deal is required to keep them out.”

Patanjali Sastri C.J.⁸ observed :

“Our constitution contains express provision for judicial review of legislation as to its conformity with the Constitution unlike in America where the Supreme Court has assumed extensive powers of reviewing legislative acts under the cover of the widely interpreted “due process” clause in the Fifth and the Fourteenth Amendments. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader’s spirit, but in discharge of a duty of plainly laid upon them by the constitution.” A society looks up to courts for solving all their problems is a weak society, indeed.

Andhyarujina refers to the sage words of Judge Learned Hand :

"you may ask what then will become of the fundamental principles of equity and fair play which our constitution enshrine; and whether I seriously believe that unsupported they will server merely as counsels of moderation. I do not think any one can say what will be left of those principles; I do not know whether they serve only as counsels; but this much I think I do know- that a society so riven that the spirit of moderation is gone, no court can save, that a society where that spirit flourishes no court need save; that a society which evades its responsibility by thrusting upon the Courts the nurture of that spirit, that spirit in the end will perish."

But the neat statement of Justice Powell gives a clear answer :

"The irreplaceable value of the power of judicial review articulated by the Chief Justice Marshall (in *Marbury v Madison*) lies in the protection it has accorded the constitutional rights and liberties of individual citizens and minority groups against oppression or discriminatory government action. It is this role not some amorphous general supervision of the federal courts and has permitted the peaceful existence of counter-majoritarian implications of judicial review and the democratic principles on which our federal government in the final analysis rests"⁹

The apt conclusion is perhaps, the words of John Marshall himself that "he never sought to enlarge the judicial power beyond its proper bounds nor feared to carry it to fullest extent that duty required."

End Notes :

1. S P Sampath Kumar Vs Union of India (1987) 1 SCC 124-130.
2. Collected Legal Papers, O W Holmes pp 295-296.
3. Archibold Cox : Court and the Constitution p 1.
4. U.S.Supreme Court Ferguson V. Skrupa, 372 U.S. 726 (1963, Justice Black).
5. Views from the Bench : Part I Judicial review and American.
Politics : Historical and Political Perspectives, page 3.
6. Views from the Bench p 279-281.
7. Andhyarujina, in his Judicial Activism And Constitutional Democracy in India".
8. The State of Madras vs V.G.Row ,AIR 1952, vol 39 p 199).
9. US V. Richardson 418 US 166).

Lecture VIII

LEGAL CONTROL OF GOVERNMENT : AN EUPHEMISM FOR REMEDIES IN ADMINISTRATIVE LAW

The idea that people who, in democratic polity, are the source of political power and of Governmental authority themselves need protection from such power and authority might appear somewhat anti-thetical. MacIver says: ... Instead of the people acting through representatives and officials, we find the officials and the representatives controlling the 'machine' The will of the people is set up as a mystical god, in whose name the political priests of a new oligarchy struggle and rule.¹

Legal control of Government is an Euphemism for the system of remedies in administrative law. Lord Reid had said in *Ridge v. Baldwin* "we do not have a developed system of Administrative Law – perhaps because until fairly recently we did not need them. "True, the Diceyan institutional trinity, viz, Parliament, Public opinion and the law of land were enough to protect the people. But it was the advent of tumultuous changes the second world war brought about, that required stronger legal control over government. In the introductory piece on Sir William Wade, Sir David Williams Q.C. observes : "Forty years ago, administrative law was about to grow up. It had for long been 'a backward child in the legal family' and this was reflected in the judicial timidity in control of the executive, in a lack of coherence in the rapidly expanding tribunals which emerged especially in the post-war years,

in serious deficiencies in the working of public local inquiries in the absence of regular informal means of dealing with complaints against the administration, in the evidence of wide governmental secrecy and in the relative paucity of writings on administrative law. Many problems still persist, but administrative law has been transformed over the past forty years and the literature is now as extensive as any"²

Administrative Law says the Encyclopedia of Britannica" derives from the need to create and develop a system of public Administration law derives from the need to create and develop a system of public administration under law, a concept that may be compared with the much older notion of justice under law. Since administration involves the exercise of power by the executive arm of government, administrative law is of constitutional and political importance as well as of juridical significance."

'The less authority men have over each other' it is said 'the better for all concerned', for then each man's native virtue will see him through'. But social organisation needs the existence of power and authority and it is the complexity of social organisation that determines their dimensions and their 'sharp eye and firm hand'. Political achievements are through institutions which are nothing but men acting "more or less deliberately in a fairly durable concert for the attainment of complex of ends". They may as Lord Radcliffe said,

"start as Plato did, with Justice, and arrive at the need to limit the freedom to compose poetry and songs, or to institute common ownership of almost all possessions. Or, seeking good in growth, he may, like Aristotle, find he must appease the appetite for wealth by

systematic education, lest the contest for it produce destructive revolutions. Or, fearful above all of disorder and death, he may, like Hobbes, prescribe the need for armies in hands of absolute government. Or, like a gentler man than Hobbes, like John Locke, he may proceed from the pursuit of happiness and tolerance to government by legislatures founded on popular election and the separate of powers. The political philosopher begins with an end and then finds ways and means, that is institutions....."³

The permanent civil services, police force, taxmen, economic and industrial policy makers, the power of economic concentrations and monopolies and the presently growing power of technology with its capacity to mould the future, are in the words of Lord Radcliff some of the "standing armies" against the citizen. All power lends itself to abuse. Every human weakness is exaggerated by power. It is the principle pre-occupation of public law to discipline public power and confine governmental authority within the bounds of the fundamental law of the land.

Plato considered "the duties of the wielders of power an "elevated one". How to find these men and women? The answer "get the best men" is, as Lord Radcliffe would call "the answer of every amateur in politics'. Plato's model state assumes their existence. Plato divided the members of the State into three classes. According to the kind each was supposed to be – the ruling class with absolute power, — the one that kept highest range of reason and self control; next to them the warrior group, conspicuous in the qualities of courage and devotion, but a little below the best in the

field of intellect, and below them came the rest, the great body of citizens, pursuing the ordinary callings of daily life, and characterised by desire and gain. Plato's ideal State was conceptual, its dividend membership unacceptable to the libertarian ideals of the modern state.⁴

The cynicism that "there is no such a thing as justice in a state; it is merely a fiction that men, who are conscious of their individual weakness, think up to keep the wild men down; or it is a word that the people in power use in order to give a moral cover to what is really their own material interest or gain or that, as argued by Nietzsche, "the only thing that deserves to be called justice is the will of the strong man : all else is slave morality" was hopefully replaced by more egalitarian societal concepts and aspirations of a welfare State.

Pascal said : "Justice without power is unavailing; power without justice is tyrannical. Justice without power is gainsaid because the wicked always exist, power without justice is condemned. We must, therefore, combine justice and power making what is just strong and what is strong just." Every civilization has to absorb an intake of self – criticism: but there seems to be in history certain special periods of disillusion, when everyone has suddenly become too sharp for loyalty, whether to old beliefs or to new truths. Criticism at such times is used not to test but to destroy values and it wipes out all distinction between things that matter and things that do not....."

Expansion of Administrative Law :

Increased functions of the State have changed its concept as an instrument of power to an agency of society. The greatest of these concerns that have so transformed the State. It was increasingly regarded as a proper function, or

even the obligation of government to ward-off distress and strain not only among the poor but amongst all citizens of society. The welfare State was:

"the institutional outcome of the assumption by a society of legal and therefore formal and explicit responsibility for the basic well-being of all its members. Such a state emerges when a society or its decision making groups become convinced that the welfare of the individual is too important to be left to custom or to informal arrangements and private understanding and is therefore a concern of government."

The Indian Constitution envisages a Constitutional moral order and commitment to a good society – a just society. The test of civilization of society is not its opulence or its standards of living, but its concern and care for the weak and the helpless.

With this ever expanding role of the Government as economic – regulator and provider of social security, there is an upsurge of the role of the 'Big-Government'. In the field of commerce and industry, the Government's role as a regulator of corporate functioning, as a monopoly financier through the State's financial agencies, Government has acquired enormous powers which if misused or unused can have far reaching effect on the corporate and non-corporate business transactions. There is a growing uneasiness in the public mind of the political overtones in the administration of these vast powers. Legal control of Government has assumed several dimensions in this area.

The development of the concept of legal control of government in India and the contribution of Indian lawyers

and judges is one of the more impressive developments of constitutionalism in India. Of course, Legal control of government is not judges control of government. As an English Judge said "British have no desire to be administered by their judges even as they do not want to be judged by their administrators". But the judicial review of legislation and administrative action, include some of the spectacular judicial feats in devising methods by which the executive is held accountable – by improving access to justice by lowering threshold eligibility standards and the requirement of personal stake in the lis. The epistolary jurisdiction is another, Recognition of public interest actions is yet another.

The key role here is that of the lawyers and the judges. The system is what they both make of it. Of the quality of these judges, a great English judge said :

"...and we know the answer. It is that the executive government must never be allowed more power than is absolutely necessary. They must always be made subject to the law; and there must be judges in the land who are ; no respectors of persons and stand between the subject and any encroachment on his liberty by the executive'. We taught the kings that from Runnymede to the scaffold as Whitehall: and we have not had any serious trouble about it since." (Dennings 'Freedom under the Law' – Hamlyn Lectures)

But the greatest danger to constitutionalism and constitutional Government in emergent democracies arises from the human factor in public life to distort and vitiate whatever government forms may be devised. However

carefully the institutional forms may have been constructed, much will turn upon the actual behaviour of individuals and their willingness to absorb the rules. In a classic analysis of the problem in "Constitutionalism in the Emergent States, a scholar says :

"....we have seen how political corruption and the waste and inefficiency which it engenders have undermined the ability of the government to secure the welfare of the people, tainting the state in the state in the public eye as an instrument of plunder and thereby alienating the peoples' loyalty; how tribal politics has, like a canker, eaten into the body politic, sapping its vital energies and the entire fabric of society, pitching tribe against tribe in mutual antagonism making impossible the development fo a national spirit...."

Compensation, it is said, is the step-child of administrative law. While countries like France have evolved public law rules for the liability of administrative bodies in damages, English courts have done so in only certain limited areas. More than all this, the development of administrative remedies and damages in administrative law are some important achievements. Bernard Schwartz says :

"A system of administrative law which fails to provide the citizen with an action in damages to make him whole....is actually but a skeletonised system. If individuals are to be protected adequately, an action for damages is the necessary complement of the action or review, which results only in the setting aside of improper administrative action."⁵

E. J Haughey

".....without a remedy of this nature being also available a formal pronouncement by a court that an administrative act is illegal or represents no more than a mere Pyrrhic victory for an aggrieved citizen."⁶

I propose to deal with some aspects of the judicial exploits in and techniques of legal control of government. The first is the transformation in the earlier judicial dilemmas the government is bound by the laws. I have dealt with some aspects of this particularly in Lecture VI. The second is the development of judicial review of contractual powers of the State. This area falls both in private law and public law situations. Not every contractual exercise falls necessarily in the public law area. Even governmental authorities have and exercise rights that do not come within the public law domain. But then state is not free to deal with its largesse in the manner it likes; but its actions have to comport with the constitutional limitations on State action under Article 14 of the Constitution. The third is that the extended application of the rules of Natural Justice to administrative decisions. The fourth is watering down the 'doctrine of sovereign immunity' as a defence to actions against State.

Lord Prof Diplock in his "Foreword" to Professor Bernard Schwartz and Professor Wade's "Legal Control of Government", (which was itself the summing-up of the transactions of an Anglo American exchange of views on the system of administrative law remedies on either side of the Atlantic) said :

"The supremacy of parliament, the direct responsibility of the political heads of government departments to a legislature of which

they were themselves members, pointed to Parliament itself as the appropriate constitutional body to control the unfair exercise by the administration of powers which Parliament had itself conferred and could itself withdraw. But as this book shows there were also effective weapons rusting in the judicial armoury in England which in very recent years have been cleaned and sharpened. Despite their antiquity they are now being put to more and more effective use"⁷

What are these weapons? Why did they rust? And again who cleaned and sharpened them? These are fascinating questions to the schoolmen. The British did not have the benefit of the Constitutional System of judicial review that America had. Dean Griswold said that in the American System : "there was no question that cannot be turned into a constitutional question." Even so, the English lawyers would say : "There is no question that cannot be turned into a jurisdictional question". The *Anisminic* is a classic case in point. An Indian judge said of it that in the case of tribunals it had made every error of law an error 'of jurisdiction'. "Illegality" and "jurisdiction" tended to become synonymous.

The altered scenario of the emerging welfare state and of the expansion of Government and the consequent need for newer tools of legal control of Government was noticed by the Supreme Court :

"Today the Government, is a welfare state is the regulator and dispenser of special services and provider of a large number of benefits, including job contracts, licences, quotas, mineral rights etc. The Government pours forth

wealth, money, benefits, services, contracts quotas, and licences. The valuables dispensed by the Government take many forms but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again thousands of people are employed in the State and the Central Government and local authorities. Licences are required before one can engage in many kinds of businesses or work. The power of giving licenses means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people".⁷

"The government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or Licences only in favour of those having gray hair belonging to a particular political party or professing a religious faith. The government is still the Government when it acts in the matter of granting largess and it cannot act arbitrarily. It does not stand in the same position a private individual"⁹

Constitutional Law and Administrative Law

There are naturally arguments on the effect of this "over-judicialisation". The exasperation of the administrator are well portrayed by D. M. Gordan :

"Anything like serious examination at large of the case law on jurisdiction must convince an open minded inquirer that there is virtually no proposition so preposterous that some show of authority to support it cannot be found (Law Quarterly Review vol. 45 1929 p 459)

"A wrong decision must be just as binding as a correct one, for, 'correctness' is often a matter of opinion. It would be unworkable to have the binding effect of a judgement depend on its agreement with facts in the absolute, for the test would have to be resort to a second tribunal, and fallibility is inherent in the fact finding machinery of all tribunals. No self-respecting tribunal would wish to act if it did so at the peril of being held a usurper whenever it failed to anticipate accurately the conclusions of other Courts, conclusions perhaps based on different evidence. Even infallibility would not protect it; it would need also the gift of prophecy to be safe from other Courts' fallibility¹⁰

"To regard procedural questions as touching jurisdiction at all seems to be a mistake. When any statute says that if a tribunal finds certain facts it shall have power to do certain things, this does not imply that only if it finds these facts by a certain procedure, this does not make observance a condition of the power, but merely make observance a condition of the power, but merely of regulatory of exercise. Although procedural provisions are impera-

tive, disregard of them creates error, not want of jurisdiction"¹¹

How the jurisdictional niceties between 'appeal' and 'judicial review' get submerged is mentioned by Lord Diplock : "If the material before the reviewing court discloses that the decision under review is one which the court would have reversed if it had come up as an appeal from a lower court of law, legal reasoning is never at a loss to find a way of reversing it despite its classification as administrative. "The reality is" as an American judge put it, "that courts see themselves as citizen's appointed protectors against abuse of power." In *State of Orissa vs Bina Pani Dai* (AIR 1967 SC 1269), the court held that even in an administrative order which includes "civil consequences, must be made consistently with the rules of Natural Justice."

The Supreme Court had observed¹² ".....It is perfectly open to the government, even as it is to private party, to choose a person to their liking, to fulfil contracts which they wish to be performed. When one person is chosen, rather than another, the aggrieved party cannot claim the protection of Article 14, because the choice of a particular person to fulfil a contract must be left to the government (AIR 1979, p 1644.) Relying on this High Court rejected the contention of the Petitioner in *Punnen Thomas v State of Kerala*¹³ who complained of his being arbitrarily and without having black listed from government contracts. But Justice Mathew in an illuminating dissent recalled the words of the U S Supreme Court held that :

"..... in the privilege of pursuing an ordinary calling or trade and acquiring holding and selling property, must be embraced the right to make all proper contracts in relation thereto"¹⁴

On the imperative of affording an opportunity of being heard the judge recalled the following words of Justice Frankfurter :

"That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth – seeking and self righteousness gives too slender an assurance of rightness No better instrument has been devised for arriving at truth than to gave a person in jeopardy of serious loss, notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular Government that justice has been done." Punnen Thomas V State. p 87 AIR 1969.

Justice Mathew said some memorable words :

"If anybody were to say that Ext P-1 is an administrative proceeding and so no notice or opportunity of heard was required and that no interference under Article 22 is possible, I would answer him in the high and powerful words of Mr. Belloc, "you have mistaken the hour of the night : it is already morning (Punnen Thomas V State AIR 1969)

The minority view of justice Mathew after ten years was adopted by the Supreme Court in Ramana's case.

There are two cases of the Privy Council that need to be noticed; viz. Yuen Kun Yeu vs Attorney General of Hong Kong



(1988) 1 AC 175 and Rowling Vs Takaro Properties Ltd. (1988) 1 A.C. There were earlier cases such as Home Office vs Dorset Yacht Club vs London Borough Council, Ans vs Martin Corporation. In India, the tort of 'Misfeasance in Public Office' and 'Constitutional Tort' were discussed in the case Common Cause vs Union of India (1999) 6 SCC 667.

Chapter Notes :

1. Modern State –The Residence of Authority” p 193-94).
2. The Golden Metwand and the Crooked Cord. Chrystopher Forsyth P 1.
3. Problems of Power : Lord Radcliffe of Verneth : Reith Lectures).
4. Problems of Power : Lord Radcliffe of Verneth :Reith Lectures).
5. Bernard Schwartz : Introduction to American Adminisitrative Law 1958.
6. E.J.Haughey : “The liability of Administrative Authorities” (1975)
7. Schwartz and Wade:Legal Control of Government , p xi.
8. Para 11 AIR 1979, p 1636, Ramana V Airport Authority of India).
9. para 11 pg 1637 Ramana v Airport Authority of India AIR 1979 SC 1628).
10. LQR 1929, Vol 45 p 460-61.
11. LQR 1929, Vol 45 p 483.
12. C.K.Achyuthan V State of Kerala AIR 1959 S C 490.
13. AIR 1969 Kerala 81.
14. Allgeyer V Louisiana (1897) 165 US 578.

Lecture IX

FEDERALISM - POLITICAL FUTURE OF THE WORLD

Metaphor of the Rising Sun

It was September 17, 1787, the last day of the Constitutional convention at the Independence Hall at Philadelphia where the Constitutional Convention was signed. "Benjamin Franklin wept as he signed. His eyes fell on a painting, and he noted the difficulty artists have in distinguishing between a rising and setting sun. Franklin had laboured unsuccessfully for a lifetime to bring the North American colonies together. Each movement toward union had been followed by retreat. For four hot and humid months the Convention had often teetered on the brink. "But now at length" he said, "I have the happiness to know that it is a rising not a setting sun".¹

This metaphor of the rising sun symbolizes the idea of federalism as a movement and not merely some fixed system. I recall those words of a scholar. "What is significant about federalism is not the achievement but the movement in itself.

"Federalism is an idea just like any other idea in Government, and the movement for federalism, with its beneficial results is more important than any assumption of rigidity with its form. Any rigid legalism would ignore the historical evolution and its potentiality as a dynamic idea for future experimentation".² At the heart of the discourse is the need for reconciliation between a rigid doctrinaire

concept of Federalism on the one hand and an accommodative, flexible one.

Classical and Doctrinaire concept :

Dicey described Federalism as a national institution for a body of States which desired "union and do not desire unity". The diverse experiments of federalism of the countries are likely to be evaluated for their claims to be federal in comparison with the American Stereo type which has the following six elements namely,

- (i) Federation is the union of several autonomous political entities called States to achieve certain common political ends;
- (ii) The division of Legislative powers between a national government on the one hand and the constituent States on the other hand;
- (iii) The national government is a government of enumerated powers while the States are governments of residual powers;
- (iv) Each State has a complete apparatus of law enforcement both executive and judicial;
- (v) The Supremacy of the National Government with its assigned sphere over any conflicting assertion of state power;
- (vi) Dual citizenship.

The political integrity of the Union and of each State is said to be essential to the federal concept. Federalism according to Neumann :

"is a form of distributing powers. Power, in a constitutional sense may be regarded as the ability to make decisions and to see that

they are carried out. If, therefore, the component parts of a State have no power of policy decision in any field, but are confined to carrying out Central Government directives through the medium of an institutional fabric of federal form, it is not a federal but a unitary State'.

The New Encyclopedia Britannica describes Federalism as a

"mode of political organization that unites separate states or other polities with an overarching political system in such a way as to allow each to maintain its own fundamental political integrity. Federal systems do this by requiring that basic policies be made and implemented through negotiation in some form, so that all the members can share in making and executing decisions. The political principles that animate federal systems emphasize the primacy of bargaining and negotiated coordination among several power centers; they stress the virtues of dispersed power centres as a means for safeguarding individual and local liberties."

These concepts of Federalism make a clear distinction between "Decentralisation" and "Non-centralisation" in regard to which The Encyclopedia says: "Non-centralisation is a way of ensuring in practice that the authority to participate in exercising political power cannot be taken away from the general or the state governments without common consent."

The crucial question to consider, shorn of all theories, is : 'Are the Union and State Governments related to one

another as Principle and Delegate?' So long as they can exercise full authority within the orbit of their Jurisdiction there is no reason to deny the federal character of the Constitution.³

Interesting questions have arisen with reference to the position the Canadian Constitution which Prof. Wheare calls 'Quasi Federal'. Lord Haldane held that the Canadian Constitution was not a federal constitution; but Lord Watson expressly laid down the opposite view. He said:

"The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy."⁴

Lord Haldane made some observations of the position of Canada under the British North American Act 1867:

"In a loose sense the word "federal" may be used, as it is there used, to describe any arrangement under which self-contained States agree to delegate their powers to a common Government with a view to entirely new Constitutions even of the States themselves. But the natural and literal interpretation of the word confines its application to cases in which these States, while agreeing on a measure of delegation, yet in the main continue to preserve their original Constitutions.

"...Of the Canadian Constitution the true view appears, therefore, to be that, although it was

founded on the Quebec Resolutions and so must be accepted as a treaty of union among the then Provinces, yet when once enacted by the Imperial Parliament it constituted a fresh departure, and established new Dominion and Provincial Governments with defined powers and duties both derived from the Act of the Imperial Parliament which was their legal source."^{4A}

Federalism : Need For a Flexible Concept in India :

The Indian Constitution chose a flexible pattern. For India the Federal Pattern was an inevitable necessity. The country exhibited a diversity of a myriad kind with widely varying regional, linguistic, ethnic and cultural patterns. For the first time in two thousand years of its history a bold experiment of bringing different peoples with different habits, ways of life, thinking, language, culture under a single common Constitutional framework was started. So infinite was the range of the diversity that even a detail such as the right of a person professing the Sikh religion to carry a "Kirpan" had had to be accommodated in the Constitutional document. Nowhere in the world such complexity and diversity could have been seen. The range of problems that confronted India at the time of Constitution making has few parallels in the history of the country. Sawyer commented : "The sub-continent of India was another area which by reason of size, population, regional (including linguistic) differences and communication problems presented an obvious federal situation, if not the possibility of several distinct nations."⁵ When cleavages are of religious or linguistic nature even developed countries find it difficult to manage. Example of Northern Ireland is the point. The recent Quebec case is again significant. We stand

in awe of the makers of the Constitution who in a situation of such seemingly irreconcilable complexity hammered-out a widely acceptable framework. The framers of the Constitution debated whether the word 'Federation' or the word 'Union' was appropriate in the Indian context and chose the latter. India became an 'Indestructible Union of States'. Federalism is part of its basic structure.

Judicial umpiring of the controversies as to the extent of the power of each unit is part of the federal structure itself. A grantee of a constitutional power can not, itself, determine the nature and the extent of the grant by giving to the subject matter a nomenclature that corresponds to the grant. In order to keep each entity within its bounds, certain constitutional principles are evolved such as the Doctrine of 'Pith and Substance'; Doctrine of Federal Supremacy; the Aspect Doctrine and the now, declining Doctrine of Immunity of Instrumentalities.

Problems of Indian Federalism came for reassessment before a number of Commissions and Committees such as the Rajaramana Commission, the States Reorganisation Commission, the Administrative Reform Commission, the Sarkaria Commission, the JVP Commission etc. Speaking of Federalism under the Indian Constitution the Supreme Court of India observed that it was not the result of any compact or agreement; but the units constituting a Unitary State which were non-sovereign were transferred by application of power into a Union. The Court said :

"A truly federal form of Government envisages a compact or an agreement between independent and sovereign units to surrender partially their authority in their common interest and vesting it in a Union and retaining

the residue of the authority in their common interest and of the authority in the constituent units. Ordinarily each constituent unit has its separate Constitution by which it is governed in all matters except those surrendered to the Union, and the Constitution of the union primarily operates upon the administration of the units. Our Constitution was not the result of any such compact or agreement : Units constituting a unitary State which were non-sovereign were transformed by abdication of power into a Union."⁶

The Court further observed :

"Legal sovereignty of the Indian nations is vested in the people of India who as stated by the preamble have solemnly resolved to constitute India into a Sovereign Democratic Republic for the objects specified therein. The political sovereignty is distributed between, as we will presently demonstrate, the Union of India and the States with greater weightage in favour of the Union."⁷

"On a review of the diverse provisions of the Constitution the inference is inevitable that the distribution of powers both legislative and executive—does not support the theory of full sovereignty in the States.

But one of the learned Judges, Justice Subba Rao dissented and was in a minority. He said :

"Though some authors, accepting the American Constitution as the yardstick for a

federation, prefer to describe Constitutions with a bias towards Union as quasi-federations, I do not think it is inappropriate to describe all Constitutions which substantially accept the federal principle as Federations. Applying this test, I have no doubt that the Indian Constitution is a federation, as the units in normal times exercise exclusive sovereign power within the fields allotted to them."⁹

In the Bommai case one of the learned judges observed :

"The expression "Federation" or federal form of Government "has no fixed meaning. It broadly indicates a division of powers between a Central (Federal) Government and the units (States) comprised therein. No two federal constitutions are alike. Each of them, be it of USA, Canada, Australia or of any other country, has its own distinct character. Each of them is the culmination of certain historical process. So is our Constitution. It is therefore futile to try to ascertain and fit our Constitution into any particular mould. It must be understood in the light of our own historical process and the constitutional evolution. One thing is clear – it was not a case of independent States coming together to form a Federation as in the case of USA."¹⁰

But the important point to note is that a flexible concept, not a rigid legalistic and doctrinaire approach, has been recognised within the broad idea of 'Federalism'. The expression 'Quasi-Federal' in itself indicates this compromise. One

of the commentators said : "Characterization such as 'quasi-federal' and 'statutory decentralization' are interesting but not particularly illuminating. The members of the Assembly themselves refused to adhere to any theory or dogma about federalism. India had unique problems, they believed, problems that had not 'confronted other federations in history'. These could not be solved by recourse to theory because federalism was 'not a definite concept' and lacked a 'stable meaning'.... The Assembly, in fact produced a new kind of federalism to meet India's peculiar needs." (Granville Austin : "The Indian Constitution : Cornerstone of a Nation, p 188)

Dr. Ambedkar explained the significance of a flexible concept of federalism to the constituent assembly and pioneers this idea of a flexible concept – The polity could become Unitary under certain conditions. An integrated judiciary, residuary legislative powers being with the union, a provision like Article 253 which enables the Union to legislate on the subject-matter of a treaty irrespective of whether the subject matter is otherwise in the Union Legislative competence. Or, within the State power, and Article 356 all detract from the concept of a classical federation. Such was the far sight of these Constitution makers. Sir Alladi Krishnaswami Aiyar, one of the members of the drafting committee had said "In dealing with a matter like this, we cannot proceed on the footing that federalism must necessarily be of a defined or a standard type."

Changing concepts of national sovereignty

This flexibility in the concept of federalism holds out new opportunities of purposeful innovations. Great global thrust towards Democracy, International Human Rights Regime, increasing pattern of internationalisation of domestic issues, global economic interdependence, have changed the

scenario. Traditional high walls of domestic sovereignty are crumbling. One of the fundamental concepts underlying the International Human Rights norms is the architecture of an inclusive pluralist society as essential for the support for Human Rights. Some recent pronouncements of the European Court of Human Rights have addressed the fundamental links between substantive foundations of democracy and polity. The interdependence between democracy and pluralism have also been re-iterated.¹¹

The Court said:

"As the Court has said many times, there can be not democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to "information " or "ideas" that are favourably received or regarded as inoffensive or as matter of indifference, but also to those that offend, shock or disturb."

In an Article by S.Marks, The European Convention on Human Rights and its 'Democratic Society' (1995) British Year Book of International Law 209 (at page 210), it is stated :

"The Convention is, of course, a product of the immediate post-war era. For the framers democracy was given a vivid significance, in the contrast with recent, personal, experience of "fascism , Hilterism, communism." A bold line distinguished the democratic "We" from the totalitarian "they" and a major, perhaps the major, aim of the Convention was now to keep things that way."

Historically the political theory of sovereignty and of domestic jurisdictions came under an unconscious influence of similar post-war introspection's of the 17th century. The Peace of West Phalia of 1648 brought to an end the thirty years war amongst several European States system. The writing of some major theorists on International Law had, undoubtedly, influenced the changing conception of the relations between the State and the International Law. The influence of the International Human Rights order on State's sovereignty, Parliamentary supremacy and generally as limitations on Government, are fascinating developments of the second half of this century.

Speaking of these changes Antonio Cassese said:¹²

"To be sure, they have not changed the actual structure of that community or the main rules of the game. Sovereign States have remained the real holders of power; Nevertheless, the two doctrines (Human Right and self-determination of peoples) have introduced seeds of subversion into this framework, destined sooner or later to undermine and erode the traditional structures and institutions, and gradually- over a very broad space of time, the course of which cannot yet be foreseen-to revolutionise their structure and institutions".

Walker and Mendlovitz made some profoundly relevant observations :¹³

"No longer, it is said, can States pretend to be autonomous or to exercise a monopoly on the legitimate use of violence in the specific territory. The most important forces that affect people's lives are global in scale and

consequence. Even the most powerful States recognise serious global constraints on their capacity to affirm their own national interest above all else"

Michael and Reisman said :

"Although the venerable term 'soverignty' continues to be used in interantional legal practice, its reference in modern international law is quite different. International Law still protects sovereignty rather than the soveriegn's sovereitgnty."¹⁴

These great changes in the concept of sovereignty were the beginning of the Universality principle. The Universal Declaration of Human Rights in 1948 and the two important Covenants of 1966 sought to put those great rights of man above the law as value judgements and made them the ethical touch stone for the validity and moral content of domestic laws.

Multi-level Federalasim :

The stunning technological innovations and political movement for self-government have the inevitable influence on the patterns of political organisations. New innovative ideas that enhance the capacity of exiting institutions to manage the forces of change are necessary. No political institution including federalism can remain static and be frozen in time. The political upheavalsresulting from assertions of the human spirit for a place in the sun can be handled only by imaginative political innovations.

The 73rd and the 74th Constitutional Amendments

The great potential and significance of this constitutional

development - Panchayati Raj - are yet to unfold themselves in a full measure. These constitutional reforms in self-government constitute, in a non-trivial sense, the second birth of democracy in India. They are not to be seen as attempts at decentralisation as some choose to think. They have the potential for "Three Tier Federalism" in India, an experiment which could have a deeper message. It is not merely some 'administrative federalism' as some scholars consider them to be on the ground that they were "expressions of decentralisation" and that decentralisation implies and pre-supposes existence of a higher legal authority. These are perhaps, legalistic approaches that tend to ignore the great thrust towards demands for innovative and qualitative changes in the political institutions of the Indian State, which is emerging as a pattern towards multi-level federalism or towards the idea of a federation of federations.

Indeed, the very wide range of diversity of individual human tendencies is itself the source of the complexity of our political institutions. Democracy itself recognises and rests on the recognition of wide range of individual tendencies which are both associative and seperative. Herman Finer expresses this idea :

"What, then, sets governments going, gives birth to its functions, and molds its organs? Every man is the abode of an inter-woven complex of associative and separative tendencies, of friendly and hostile dispositions. Individual man is by himself incomplete. It is his nature to need the help of others to complete himself. He is a parasite on some, a murderer of others, to satisfy his longings, which may be noble but too powerful for his

self control. Yet he also sympathizes with some of the aims of other people. Hume and Adam Smith and Edmund Burke built much of their political and economic theory on the conviction that man had a natural, indefeasible sympathy for man, instinctive and general. Out of this crepitating ball of fierce energies, dynamic or static, springs forcefully a design of cooperation or domination, again in intermixed layers and seams, marvelously subtle and combined."

Finer refers to 'The Grand Inquisitor' in Dostoievsky's 'Brothers Karamazov' confronting the apparition of Christ on precisely this question :

"whether to leave the determination of what is right to the freely questing masses and risk unrest, turbulence, riot, murder, and war; or to take choice out of the hands of the masses and stilling their unrest by bread, the circus, a myth; a hierarchy; and the infallibility of a doctrine enforced by imprisoning and torturing the disobedient."

Federalism : As the Future World Order :

Power, progress and purpose in the advance of civilizations clearly indicate a new human destiny. Every crossover point across the civilizational path indicate a definite thrust towards a global maturity. A scholar postulates that by 2050 A.D. Global population will peak at 11 billion people who mainly live in knowledge-societies, although some remain at industrial or agrarian stages. Powerful information systems will be used to manage the complexity of this global civilization

and to advance the pursuit of knowledge and technological breakthroughs. The resulting ten-fold leap of industrialization would compel all techno – economic systems to be made ecologically benign. Most nations will be a part of a 'functioning global community', but a decentralised form of governance also nourishes diversity. These differences are held together by an international culture – call it federalism or what you may – that agrees on common standards of behaviour and a general set of spiritual values that unites the world into a functioning whole. This vast intellectual force will be harnessed to discover the deeper laws of physics that will allow human life to expand throughout the universe."¹⁵

This is the nature of the global federal state in which not only governments but also the corporate world, scientific community will participate in a noble global composite federalism. This will no longer be a mere choice but the inevitable destiny of man. Four more decades are not too long a period in history. The foundation for this future potential are laid by jurists and visionaries like justice Subba Rao as a constitutional interpreter and law makers such as Dr.Ambedkar, Sir Alladi Krishnaswami Iyer and others.

However in the Quebec case the Supreme Court of Canada said :

It is undisputed that Canada is a federal state. Yet many commentators have observed that according to the precise terms of the Constitution Act 1867, the federal system was only partial. See, e.g, K.C.Wheare, *Federal Government* (4th ed.1963 at pp 18-20). This was so because, on paper, the federal government retained sweeping powers which threatened to undermine the autonomy of the provinces. Here again, however, a review of the written provisions of the Constitution does not provide the entire picture. Our political and constitutional practice has adhered to an underlying principle

of federalism, and has interpreted the written provisions of the Constitution in this light. For example, although the federal power of disallowance was included in the Constitution Act 1867, the underlying principle of federalism triumphed early. Many constitutional scholars contend that the federal power of disallowance has been abandoned (e.g, P.W.Hogg, *Constitutional Law of Canada*, 4th ed 1997, at p 120).

56. In a federal system of government such as ours, political power is shared by two orders of government: the federal government on the one hand, and the provinces on the other. Each is assigned respective spheres of jurisdiction by the Constitution Act 1867.

57. This underlying principle of federalism, then, has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution. In the *Patriation Reference*, supra, at pp 905-909, we confirmed that the principle of federalism runs through the political and legal systems of Canada. Indeed, Martland and Ritchie JJ., dissenting in the *Patriation Reference* at p 821, considered federalism to be "the dominant principle of Canadian Constitutional law". With the enactment of the Charter, that proposition may have less force than it once did, but there can be little doubt that the principle of federalism remains a central organizational theme of our Constitution. Less obviously, perhaps, but certainly of equal importance, federalism is a political and legal response to underlying social and political realities.

58. The principle of federalism recognizes the diversity of the component parts of Confederation and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The scheme of the Constitution Act 1867, it was said in *Re the Initiative*

and Referendum Act (1919) A.C935 (P.C) at p 942 , was not to weld the Provinces into one, not to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest.

59. The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains reasons for establishing a federal structure for the Canadian union in 1867.

Chapter Notes :

1. (Archibald Cox : "Court and the Constitution" p.31).
2. M.V. Pylee : "The Federal Court of India", p 6&7.
3. Sir.Alladi Krishnaswami Aiyar, 'Constitution and Fundamental Rights, p 16).
4. See Liquidation of Maritime Bank Vs Receiver General of New Brunswick (1892) A.C 437 (441-42) 4A. See : A G of Australia Vs Colonial Sugar Refining Co.1914 A.C.237 (253)
5. Sawyer : Modern Federalism, 1969, p 284.
6. State of West Bengal v. Union of India, AIR 1963, para 37 p 1252.
7. State of West Bengal v. Union of India, AIR1963, para 27 p 1241).
8. State of West Bengal v. Union of India, AIR 1963, para 37 p 1252.

9. State of West Bengal v. Union of India, AIR1963, Para 82, p 1269).
10. S.R.Bommai V. Union of India (1994)3 SCC, para 274.
11. See the United Communist Party of Turkey vs. Turkey -1998, 26 of EHRR 121.
12. Human Rights in a Changing World.
13. Walker and Mendlovitz "Interrogating State Sovereignty".
14. Sovereignty and Human Rights in Contemporary International Law : American Journal of International Law)
15. Halal, W.E. 1993. World 2000 Futures 25 : 5-21.

Lecture X

LAW IN THE NEXT SOCIETY

'It happened that a certain heathen came before Rabbi Shammai and said to him "Convert me on one condition that you teach me the entire Torah (the first five books of the Bible) while I am standing on one foot" Rabbi Shammai drove him away with the builder's measure that was in his hand. He then came before Rabbi Hillel, who converted him. Hillel said to him, "That which is hateful to you, do not do your neighbor. That is the entire Torah; the rest is commentary. Go and learn it.'¹ Do unto others, said Christ, as you would like them to do unto you". In the Hindu scriptures it is "Na Pareshu Kurvitha Janan Apriyam Athmanah!" "Do no harm" is the eternal message of religionists, ethicists, moralists and environmentalists. Even though the State today is increasingly seen more an agent of society than a 'power' 'authority' and 'coercion' in one form or the other are the means of Statecraft. What, then, are the limits of State Power? When does disobedience of the authority of the State becomes not only a right, but also a moral duty?

The twentieth century saw enormous prosperity but at the same time, the inequalities of international economic order has become more pronounced. The top one-fifth of the world's rich has 86% of the world's GDP and controls 82% of the world's export markets. The bottom quintile has just 1% of both. Professor Jeffrey Sachs in his article in the Economist "New map of the World" says "today's world is not divided by ideology but by technology.

A small part of the globe, accounting for about 15% of the world's population, provides nearly all of the world's technology innovations. A second part, involving half of the world's population, is able to adopt these technologies in production and consumption. The remaining part, covering around a third of the world's population is technologically disconnected". His new map of the world places the entire North-India in the third category.

This gap, is likely to widen. These facts are some broad indicators. Out of 3,37,000 patents granted in 1988, 91% went to the OECD countries with a global population of just 19%. Out of 70 billion dollars spent on Health research in 1988, less than 0.5% went towards the problems of the tropics. Out of 1223 new drugs introduced during 1975-96, only 13 were relevant to the problems of the under-developed countries. The global healthcare expenditure is about 2800 billion dollars. India's is just twenty. The Human Development Report, (1999) says that under influence of globalisation the GDP in the Russian Federation fell by 41% during 1991 – 1997; The life expectancy of the Russian male dropped four full years to 58.

New innovations promise a new range of consumer products. An article in the 'Time' (February 1998) gave an idea. It said that by 2005, video postcards, post card sized film screens that display 10 seconds of holiday sights and sounds are introduced on to the market to promote tourism. By 2006 smart construction materials with electronic sensors built into their molecular structures detect excessive stress and warn of the potential collapse. Clothes made from smart fabrics automatically warm up the wearer in cold weather and cool him down in hot weather; by 2007 new cars will be equipped with anti-collision radars, thermal imaging systems

to improve visibility on board computers that detect and warn drivers about imminent faults and satellite based global positioning system; by 2016, the holographic telephones project a life size holographic images of the person being called and by 2025 computer connected directly to the brain might enable persons to recognize and respond to thoughts, obviating the need for the manual input of data and commands.'

These innovations might themselves pale into insignificance compared with the future mind-boggling breaks-through in genetics, space research and artificial intelligence. They will all border on the fantastic. Newer concepts and kinds of property and privileges will emerge. Newer forms of intellectual property and mechanisms for their control and exploitation will follow. There will, correspondingly, be newer forms of human poverty and deprivations. The ethic-neutrality of science will tend to erode objective moral standards.

The challenges of the future are many dimensional. First, of course, is the impact of fast changing industrial technologies, and the corresponding obsolescence of those in the third world. The key element in management is innovation and the competitive ability to handle a 'knowledge economy'. The second dimension is the effect of demographic changes on markets jobs and consumption patterns. The third is the increasing phenomenon of urbanization. The fourth is the vision of the nature of the 'Next Society'."

Futuristic demographic extrapolations indicate the likely size of the challenge In India the percentage of the plus 60 generation is about 7.5%. It is 21% in Germany. In the next generation percentages of elderly will be nearly 50% in America, Germany and Japan. Germans would import a million workers annually from outside. Indeed in 1998

foreign exchange remittances of Indians working abroad were twelve billion dollars — nearly six times India's foreign aid. 'Reduction of the younger population causes an even greater upheaval, if only because nothing like this has happened since the dying countries of Roman empire'. The consumption pattern will be determined by the middle aged, or as Professor Drucker puts it : 'it will split into two: a middle-age-determined mass market and a much smaller youth-determined one.

Role of law and legal institutions

A clearer understanding of the correspondence between and inter-relationship of economic and legal changes becomes necessary. Compatibility of economic laws and government's economic policy is important. Developments in corporate size and governance require matching legal institutions. For this purpose law would necessarily represent a complex set of rules and institutions, both formal and non-formal. Both their allocative and procedural aspects need adequate attention. The current static nature of the legal institutions generate and the inertia in the formulation of adequate responses. Bureaucratic systems will prove to be an exhausted apparatus. Gen. Michael Ryan mentions the enduring power of inertia of administrative systems. He refers that the to a British had created a civil-service job in 1803 which called for a man to stand on the Cliffs of Dover with a spyglass. He was supposed to ring a bell if he saw Napoleon coming. The job, Gen. Ryan says, was abolished only in 1945.

The enormous growth of the economic power and the influence of the corporate world and its multi-national operations will leave the domestic regulatory systems gasping for breath. International Intellectual property regimes need

much smarter responses from the third world countries. All regulatory measures tend to become more global in character.

The inadequacies in and the failure of legal systems is responsible for the burgeoning of extra-legal systems. Many governments in the developing countries today are unable to combat these extra-legal systems. The causes and cures of these ills are set-out in an excellent analysis by De Soto². He demonstrates how the unimaginative and rigid legal systems, particularly in regard to land ownership, hinder enterprise and how the assets of the poor in the developing countries are unable to be turned into live capital. He says that in the developing countries the value of the savings among the poor is enormous. He gives a comparative estimate that if the United States of America were to enhance its foreign aid to 0.7% of its national income as recommended by the United Nations, – ‘it would take the richest country on earth more than 150 years to transfer to the world’s poor the resources equal to that they already possess’. Speaking of the savings of the poor in the third world countries, which he estimates at 9.3 trillion dollars, he says that it is very nearly as much as the total value of all the companies listed on the main stock exchanges of the world’s twenty most developed countries :New York, Tokyo, London, Frankfurt, Toronto, Paris, Milan, the NASDAQ and a dozen others. It is more than twenty times the total direct foreign investment into all Third World and former communist countries in the ten years after 1989, forty-six times as much as all the World Bank loans of the past three decades, and ninety three times as much as all development assistance from all advanced countries to the Third World in the same period”.

These assets of the poor cannot achieve their potential for a parallel life as a sources of capital owing to the archaic land laws and complicated administrative procedures.

Speaking of the poor, he writes :

"The words 'international poverty' too easily bring to mind images of destitute beggars sleeping on the kerbsides on Calcutta and hungry African children starving on the sand. These scene are, of course, real, and millions of our fellow human beings demand and deserve our help. Nevertheless , the grimmest picture of the Third World is not the most accurate. Worse, it draws attention away from the arduous achievements of those small triumphed over every imaginable obstacle to create greater part of the wealth of the society. A truer image would depict a man and a woman who have painstakingly saved to construct a house for themselves and their children, who are creating enterprises where nobody imagined they could be built. I resent the characterisation of such heroic entrepreneurs as contributors to the problem of global poverty. They are not the problem. They are the solution."

The author referred to the stirring message of Cornwell's story :

"An Indian merchant who had been promised by a prophet that he would surely become rich beyond all imaging if only he would seek his treasure. The merchant travelled the world only to return home old, sad and defeated. As he re-entered his abandoned house, he needed a drink of water. But the well on his property had silted up. Wearily, he took out his spade and dug a new one – and instantly struck the Golconda, the world's greatest diamond mine."

Economic Philosophy - Underpinnings of Constitutional Interpretations :

The policies of governance are interwoven with the economic philosophy of the State. Will Hutton illustrates the dramatic differences in social results that emerge from the differences in the economic philosophies of U.S.A and Europe. Catholic Feudal Europe, he points out, insisted that wealth and property were associated with profound reciprocal social obligations; and it was this ethical view which partly inspired socialism when it advocated common ownership of the means of production and proper respect for the rights of workers. He says although both Christianity – or certainly the organized church - and socialism are in eclipse as vital, dominant philosophies, the ethic that underpins them both survives. No population in any single European country shares the American majority view that the government should not re-distribute income; 63 percent of British are in favour of income re-distribution compared to just 28% of Americans.

Europe, Hutton says, for long accepted that reason and science are the twin underpinnings and driving forces of Western society; that religious faith cannot trump or obstruct science but must seek reconciliation with it. No European country would accept that the teachings of Darwin, for example, could not be taught because they challenged the precepts of the Bible; the Bible may be taught, but so must science. Contrast this with the great 'Monkey Trial' in the US in the twenties of the last century.

But the philosophy of private ownership sanctified by religious sanctions in America had a different emphasis. As Hutton points out :

"From the start then, the autonomy of private property rights in the US has been seen as the

legitimate consequence of man's interaction with nature; civil society naturally respects property and government as its protector. Any notion that property rights were a concession granted by the state in the name of common interest....had been dispelled by the revolution. As for re-distribution, that was an even greater offence against nature. The acquisition and holding of property was a private initiative, and what was required of the federal state was that it is policed and arbitrated between the resulting private contracts between property holders...."

'The sanctity of ownership and rights of property were being spread from the settler farmer to the company.'³

The result is the enormous disparities — social and economic — that we see in man's worldly possessions in the international economic order. In US alone 43 million people in the US live without health insurance. Most Southern States dis-enfranchise persons convicted of certain crimes. There are thus 4.2 million dis-enfranchised voters – almost 2% of the electorate. Between 1993-98 some 2,00,000 persons died from guns in the USA. USA has just 5% of the world's population but has 25% of the world's prison population. India has 16% of the world's population but has only 4.5% of the world's prison population.

New Sources of Energy

The new biology, will change the face of the world. In less than ten years time there will be 'Fuel Cell' technology in energy, by about 25 years from now 'Fusion' energy is a stateable possibility. In environment, bio-degradability,

recycling, desalinated marine water, sophisticated industrial ecology and economic system /designs will emerge. In the farm and food production front, there will be designer species, genetically modified and therapeutic foods and it may ultimately lead to possibility of artificial and synthetic food. Information technology will see smart computers, neural networks and human – computer interface. E-commerce will be the in-thing. 100 years of life span will be a normal feature by about 2040.

In medicine, and genetics, we will see the culture of cloned organs, designer babies and of course computerized health care. Transportation with hypersonic airplanes, intelligent and automated highway and fuel cell cars, law in reproduction technology will reach mind boggling levels.

In 1800 AD the world's population was about one billion. Demographers say that it took 131 years to add the second billion. The sixth billion was added in just 11 years. 'Knowledge increasingly becomes the energy source. Every civilisational change that has occurred in history is accompanied by marked changes in the sources of industrial energy. If in feudal societies it was 'human labour', in information era the information revolution, it is the management of information, through information technology systems. In the knowledge era it is 'knowledge'. Each cross over point in energy sources – steam energy, electrical energy, petroleum energy, information, knowledge , has influenced habits, employment patterns, life-styles etc. One such was when electric power began to replace gas. The changes that are now in the process of emerging, in view of their global application will be far more intense. Legal systems will have to respond to social issues that are likely to fall out from these stupendous changes.

Law will necessarily take on issues which will have profound meaning for the future of mankind. For instance, the interface between Data base of DNA fingerprinting and issues of privacy. The socio ethical issues of how far human intervention could go in some of these areas which are intensively personal. If a genome map indicates the predisposition to a possible prospective genetic disability of a person, how far would it be permissible to put into the scales in assessing suitability for employment? In choosing from a group is the constitutional equality in law or genetic equality that is to be put into the scales? What ethical standards should govern them?

The discovery of Double-Helix closely guarded secret capacity of a living cell to encode a chemical to transmit its biological destiny is perhaps the most stunning discoveries of the last century. It has opened up a tremendous vista of possibilities of manipulation of plant and animal life. In the beneficial side it is now possible to enrich the rice grain with Beta cortozon which will, hopefully solve the problem of child malnutrition. On the other side, it holds out awesome possibilities of cloning and asexual multiplication of similar life models. Biotechnology holds out stunning possibilities for the future. It has tremendous positive potential for better management of health issues till recently considered impossible. But the more important issue is the ethical one. Are there limits of human intervention in life patterns? There are so many ethical issues that are not fully addressed. One the one side it is argued that Nature is God's plan and the use of genetic tools to manipulate Nature is unethical and risky. The argument of the other side a brave new world is that intervention in nature is necessary and desirable for the better future of mankind. The only limits are knowledge, i.e. science and ability i.e. technology.

The laws' response to these issues is the biggest challenge to it in the next society.

Chapter Notes :

1. Jessie Liberty : Clouds to Code: page 5.
2. De Soto : "Mystery of Capital".
3. Will Hutton : "The World We are in".

Lecture XI

EPILOGUE

A report on "Preventing Deadly Conflict" (Dec 1997) the Carnegie Commission observed:

'The world of next century will be markedly more crowded, interdependent economically, closely linked technologically, increasingly vulnerable ecologically and progressively more interconnected culturally. Trends in this direction have long been apparent, but what has only recently come into sharper focus is the importance of managing the peace of change and its widespread repercussions. Contributing to this focus is the highly destructive power and universal availability of modern weaponry.'

In the 21st century is going to be a century of stunning and accelerated changes there will be a great renaissance in Arts, Literature and Spirituality as the counter-veiling forces against the dehumanizing effect of materialism. But in 21st century growth shall be limitless. In the immediate decade before us in India, the thrust areas of growth would be 'Health-Care and Education. Health-care including pharmaceutical industry, medical electronics and software, tele-medicine, immunology, nutrition, hospital and equipment design, training of medical and paramedical personnel, Education is yet another area—there are 400 million children below the age of 14 in India. Their education, training, moral and physical well being will be gigantic enterprise. In both these areas there would be increasing interest evinced by multinational groups.

The Microsoft publication "Unlocking Knowledge Assets" summarizes the needs of the future beautifully:

'The capacity to turn knowing into knowledge and knowledge into productivity and innovation will be the hallmark of the successful enterprise in the twenty-first century. The Industrial Revolution is giving way to the Knowledge Revolution – no gunfire, no loud machines, no armies of workers marching into the cities. Managing an organization in the knowledge era will become synonymous with managing all forms of knowledge. The rules of the game will evolve – the principles of good management will become synonymous with the principle of Knowledge Management. Organizational foundations are static. The future is dynamic.

What is the future of mankind like? Would it be able to handle the great changes that these forces of change that it imposes itself? In just about four decades ahead, demographers predict population of the world would be around eleven billion – something that the earth and its ecology will not be able to sustain. Serious talk has been bestowed by scholars and futurologists on some of these irresolvable issues of man's future. A scholar¹ says:

"The evolution of life from simple organisms to human civilization is so obvious that children readily grasp the concept when visiting any museum of natural history. Yet in other respects, evolution remains highly controversial because it spans an enormously long past, and it raises provocative questions about an uncertain future.

Great confusion persists over whether life gets better or worse, and we are not even clear about the nature of progress itself. What exactly is it that progresses, increases or decreases or improves? Physical growth, such as the number of people and their wealth? Or is it subjective factors, such as quality of life and happiness? Controversy over the causes of evolution reflect a similar dichotomy. Most educated people support scientific theories of Darwinian evolution, but many others believe that life is guided by transcendent forces."

William Halal identifies seven stages of evolution : biological era, nomadic era, agrarian era, service era, Knowledge era, Existential era and the corresponding technical base for these stages of evolution according to him are : Genetics, primitive tools, farming, manufacturing, social systems, computers and mind/spirit respectively. The corresponding energy for these seven stages according to him are biomass, human labor, animals, fossil fuels, attitudes and emotions, information, values and beliefs.

The key to understanding evolution according to Halal, "lies in viewing the rapid changes of our time as cultural equivalents of biological evolution. Theodoisun Dobzhansky (1962) noted that "biological and cultural evolution are parts of the same process". Humans today are not very different genetically from their ancestors, yet civilisation has progressed enormously since then. The dramatic changes occurring now – computerization, biogenetics etc – are the result of technical advances created by sophisticated societies. The first of the six stages are historic fact, while the last – the Existential Era- is a logical but somewhat speculative projection.

Halal argues that the central principle is that all the

stages of evolution are drawn by technical processes. Technology is to be understood as application of knowledge to solve practical problems.

Civilization began when the invention of farming permitted stable communities that formed Agrarian Societies. Later manufacturing technology introduced the Industrial Age and began to automate farming, reaching a crossover point about 1850 when factories replaced farms as employer. The next cross over point occurred in 1950 when the automation of factories moved the bulk of the labor force to white collar work.

The Service Era then emerged based on the use "social technology" Although the concept of "social technology" is not generally understood, it also fits the broader definition used here. Just as physical technology is derived from applications of physical science, social technology draws on various social sciences to design and lead social systems.

Just as in the previous stages, service economies are being automated by the next higher level - information technology. The computer is eliminating clerical work (automatic bank tellers, word processing), sales (online marketing), middle management (virtual organisation) and other routine service tasks. The cross over point to the knowledge era occurred about 2000 A.D. when a majority of the work-force began using intelligent information systems in homes and offices connected by global communications networks such as the internet.

Beyond information era, we may witness a "spiritual revolution" powered by "mental/spiritual technology" to produce an "Existential Age". This is speculative, obviously, but it follows logically from the order of increasing abstraction as evolution process from farming to industry, to social

relations to information, and finally to spiritual concerns. Tonybee(1954) observed an historic trend toward the "etherealisation of life". Spirituality is often dismissed as ignorance or fantasy, but that's because its very nature transcends rational logic. As we shall see, spirit that vast domain beyond knowledge.

These changes have profound influence on society and its organisations. For instance, taking the American experience in 1800 A.D. the percentage of US Labor force depending on agriculture was 65% or so but in 2000 A.D it is a mere 3%. The labor force in what is called the "spiritual era" might be virtually nil.

To keep the discussion focussed on reality, let's ignore the "supernatural" implications by thinking of spirit as "the human state of mind". Webster's dictionary (McKechnie, 1979) defines "spirit" as "will, consciousness, frame of mind, disposition, mood. As in high spirits "This prosaic spirituality is simply that changing sense of awareness we all experience while passing through various states of consciousness every day. For example, consider the altered mood produced by alcohol and drugs, practices, such as meditation or prayer, social rituals and ceremonies , the aesthetic impact of art or music, physical activity such as jogging or dancing and many other factors that have been shown to affect the mind. (Smith, 1975; Ferguson, 1980, Panati, 1980) An impressive body of evidence is accumulating to demonstrate the utility of spiritual technology. Medical research shows the strong impact of mental attitudes on health. The use of spiritual practices is growing in business, sports and politics. Roughly 1000 books appeared recently with "soul" in their title (Halal, 2001). These are not usually considered technologies, but fit the definition used earlier. For mental/spiritual technolo-

gies are used to shape emotions, mood, understanding of other facets of awareness to cope with life's challenges.

Thus, spirit is more than "bliss" or "goodness" – it is a state of mind that is manifested in "existential" acts. As many philosophers have noted, life is actually lived moment-by-moment as we make crucial decisions that determine the course of events. And because spirit sets our perception of reality itself, all behaviour flows out of this private 'sense of being' or 'stream of conciseness' that people inhabit. Many claim the biggest problem in modern society-crime, drug abuse, sexual promiscuity, conflict etc – stem from lack of worthy values, the absence of emotional support, and other failures of spirit. Spiritual technology offers a means by which people can gain control of their lives, and so the Existential Era represents a vast frontier beyond the information age in which society can be guided more effectively (Halal 2001)

Spirituality can be misused, of course, like anything else. However, it seems destined to rise in importance as escalating complexity, massive change, social disorder, and other challenges of our time demand higher levels of insight, clarity of mind, social cohesion and the sheer moral will needed to make tough existential choices. Spiritual technologies may appear mysterious now, but people living mere century ago would have been equally mystified by TV, computers, space travel and other technologies we take for granted today. Arthur C Clarke (1973) noted that future technologies always appear to be magical.

A few caveats seem necessary to clarify the limitations of this framework. Obviously, these trends are restricted to industrialized nations while much of the world remains at the agrarian level. And higher forms of technology have always been used to some extent, so in a sense nothing is really

new. Ancient societies employed social technology (governments, armies etc), information technology (hieroglyphics, etc) and spiritual technology (religious rituals) The stages described here occur when some function develops into a formal, rational, more powerful technology. It then becomes the principle task for the majority of the work force instead of remaining the concern of a small elite.

What seems clear is, that civilization progresses up a hierarchical order toward, 'nonphysical' technologies that offer increasingly greater power. Social interaction and information are abstract phenomena that behave very differently than the physical world. Cooperative relationships can harness energy within a social system and knowledge increases when shared (Halal 1998). Mental/Spiritual technology is more powerful still because beliefs motivate behaviour. The vast power of this domain was illustrated nicely when politicians attended a rally held by Reverend Billy Graham : "We think of ourselves as being in the business of trying to motivate people. But that! That was power".

To carry this line of thought further, many scholars think human spirit is connected to some "universal" form of spiritual energy. J.K.Rowling creative author of the Harry Potter books, described the source of her inspiration this way: "It feels as if someone zapped the ideas into my head". So, we come to the fascinating possibility that this entire evolutionary process may be powered by some poorly understood spiritual force that flows from the top of the technology hierarchy, where it then cascades like a waterfall. (Trocale, 1978) down through the lower levels in the form of information, then social behaviour and finally as physical artifacts.

What is the future of law and legal institutions in the

vastly changing scenario? However sophisticated the information management systems be, computers cannot substitute human judgement in conflicts of human relations. The mental elements of deliberation, intention, negligence, distrust are not be amenable to standardized mechanical analysis. Judges' role cannot be substituted by computers and information systems although it might greatly help and energize the process. The nature of interpersonal conflicts, conflicts between State and citizen will all change dramatically. Even personal and emotional life of men and women will change and along with it the need to even redefine some of the basic concept of motherhood may need to be re-defined. So is the concept of legitimacy. The issues of public policy an ethical and moral dilemma in reproductive technology will inevitably interact with each other. There will be tremendous pressure of emotional issues in their management. One thing that becomes clear is that the role of the court and judges will change profoundly in the direction of more interdisciplinary mechanisms. Quest of truth and justice will markedly be more courageous. The role of the judge becomes more sophisticated and complicated than ever before. In many areas where the judge has to represent act as 'reasonable man' he will be called upon to apply newer definitions of the 'reasonable man'. Fifty years ago Lord Radcliff of Verneth said "before the 'reasonable man' enters the stage the actual parties would become disembodied spirits and from their ashes raise the concept of 'reasonable man' who really is the anthropomorphic conceptuality of justice and that is the figurative role of the court itself. 'It is an idea to help judges and juries locate an accessible unbiased standard' A learned author called this 'reasonable man'. 'In England , it's the passenger on the Clapham omnibus;

in Canada it is the commuter on Yongue Street subway; in Australia it is the customer on the Balmain ferry. In America, it's the guy or gal who doesn't yet –but sure as hell plans to – own a private jet'.²

The 'reasonable man' of the future will present the judge who is to enact him on the stage more elusive than ever.

I might recall the words of Lord Hailsham uttered in a different context :

"In this life of pilgrimage we cannot hope attain it. But we can come for ever closer, in the constantly refined, but always provisional, hypothesis we have to make, whether in our understanding of the physical world, our appreciation of beauty, or in the constant reciprocities and responsibilities of human intercourse. To say that we shall never, within the confines of this life achieve finality is neither to surrender to agnosticism, not to worship doubt."

"For ever, truth is better than falsehood, kindness than brutality, virtue than vice, beauty than ugliness. But what exactly is truth, what falsehood, what exactly in a given context is true kindness, what virtue and what vice are questions to which our hypotheses are never more than provisional, and always subject to revision as we plod our through wilderness of experience. Curiously enough, it is at this final point, but with the opposite emphasis, that we approach not all that far from the dogma of the logical positivist."

"At that stage we are compelled to say :
That of which we cannot speak intelligibly
is something about which one is bound
to keep silence" But it is the silence of
worship, not off ignorance.³"

Chapter Notes :

1. The Life Cycle of Evolution : Power, Progress and Purpose in the Advance of Civilization – William E Halal, George Washington University.
2. Justin Fleming : "Barbarism to Verdict".
3. Lord Hailsham, "Values : Collapse and Cure".

CALCUTTA UNIVERSITY

List of the Tager Law Lectures

<u>Professors</u>	<u>Subjects</u>
1870 Herbert Cowell, Esq.	The Hindu Law, being a Treatise on the Law administred exclusively to Hindus.
1871 Herbert Cowell, Esq.	-Do-
1872 Herbert Cowell, Esq.	The History and constitution of the courts and Legislative Authorities in India.
1873 Shamacharan Sarkar, Esq.	The Mahomedan Law, being a Digest of the Sunni Code.
1874 Shamacharan Sarkar, Esq.	The Mahomedan Law, being a Digest of the Sunni Code in part and of the Imamiya Code.
1875 Arthur Philips, Esq.	The law relating to the Land Tenures of Lower Bengal.
1876 Dr. Rashbehary Ghosh	The Law of Mortgage in India.
1877 Ernest John Trevelyan, Esq.	The Law relating to Minors in Bengal.
1878 Dr. Gooroo Das Banerjee	The Hindu Law of Marriage and Stridhan.
1879 Dr. Trailokyanath Mitra	The Law relating to the Hindu Widow.
1880 Rajkumar Sarbadhikary, Esq.	The Principles of Hindu Law of Inheritance.
1881 William Fisher Agnew, Esq.	The Law of Trusts in British India.
1882 Upendranath Mitra, Esq.	The Law of Limitation and Prescription in British India.
1883 Dr. Julius Jolly	Outline of a History of the Hindu Law of Partition, Inheritance and Adoption.
1884 Ameer Ali, Esq.	The Law relating to Gifts, Trusts

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| | and Testamentary Disposition among the Mahomedans. |
| 1885 Krishnakamal Bhattacharyya, Esq. | The Law relating to the Joint Hindu Family. |
| 1886 K.M. Chatterjee, Esq. | The Law relating to Transfer of Immovable Property Inter Vivos. |
| 1887 Gilbert Henderson, Esq. | The Law relating to wills in India. |
| 1888 Gopalchandra Sarkar, Esq. | The Law of Adoption in India. |
| 1889 Lalmohan Doss, Esq. | The Law of Riparian Rights, Alluvion and Fishery. |
| 1890 T.A. Pearson, Esq. | The Law of Agency in British India. |
| 1891 Pandit Prannath Saraswati | The Hindu Law of Endowments. |
| 1892 Maulvi Muhammad Yoosoof, Khan Bahadur. | The Mahomedan Law relating to Marriage, Dower, Divorce, Legitimacy and Guardianship of Minors according to the Sunnis. |
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205

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207

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1991	Mr. Justice M.N. Venkata- chaliah	"Some Makers of Indian Law"

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Bangalore

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